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MICHAEL RODAK, JR

Nos. 73-1766 and 73-1834

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

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RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT, CROSS-PETITIONER RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES

OPINIONS BELOW

The opinion and order of the district court (P.A. 15)[1] has not yet been reported. The United States Court of Appeals for the District of Columbia circuit

[1] The reference "P.A." is to the Appendix to the Petition in No. 73-1766. The reference "J.A." is to the unsealed joint appendix filled in this case.

has neither considered nor rendered an opinion in this case.

JURISDICTION

The opinion and order of the district court was entered on May 20, 1974 (P.A. 15). On May 24, 1974, the President filed both a timely notice of appeal in the district court and a petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit. Upon the filing of the appeal, the order of the district court was stayed. On May 24, 1974, appellee, United States of America, filed in this Court a petition for writ of certiorari before judgment, which was granted on May 31, 1974. (No. 73–1766) On June 6, 1974, the President filed a cross-petition for writ of certiorari before judgment which was granted on June 15, 1974. (No. 73–1834) At that time, both cases were consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The district court, relying in part on *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973), denied the motions filed by the President to quash a trial subpoena *duces tecum* directed to the President for presidential materials, and to expunge any finding by the grand jury that he was an unindicted co-conspirator in a criminal proceeding. The questions presented here for review are:

1. Whether the Court has jurisdiction to review the order of the district court on the grounds that either:

a. the district court's order of May 20, 1974, was an appealable order, or

b. the Court has jurisdiction to entertain and decide a petition for mandamus transmitted by a court of appeals to this Court.

2. Whether the Judiciary has jurisdiction to intervene in an internal dispute of a co-equal branch.

3. Whether a court can substitute its judgment for that of the President, when he exercises his discretion, in determining that disclosures of presidential records would not serve the public interest.

4. Whether a court has authority to enforce a subpoena against a President of the United States by ordering him to produce for *in camera* inspection, records demanded by a subpoena when the President has interposed a valid and formal claim of privilege.

5. Whether, under the Constitution, a grand jury has the authority to charge an incumbent President of the United States as an unindicted co-conspirator in a criminal proceeding.

6. Whether the Special Prosecutor has made the necessary showing required to obtain materials under Rule 17(c), Federal Rules of Criminal Procedure, and *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

551-585—74——2

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

The constitutional provisions, statutes, rules, and regulations involved are set forth in the Appendix, *infra*, pp. 138–164, are:

Constitution of the United States:

Article I, section 2, clause 2.
Article I, section 3, clause 7.
Article I, section 5, clause 2.
Article I, section 6.
Article II section 1.
Article II, section 1, clause 1.
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Article II section 3, clause 1.
Article II, section 3, clause 7.
Article III, section 2.

Statutes of the United States:

18 U.S.C. 371; 62 Stat. 701.
18 U.S.C. 1001; 62 Stat. 749.
18 U.S.C. 1503; 82 Stat. 1115.
18 U.S.C. 1621; 78 Stat. 995.
18 U.S.C. 1623; 84 Stat. 932.
Jencks Act, 18 U.S.C. 3500; 84 Stat. 926.
18 U.S.C. 3731; 84 Stat. 1890.
28 U.S.C. 44; 82 Stat. 183.
2 U.S.C. 133; 85 Stat. 742.
28 U.S.C. 1254; 62 Stat. 928.
28 U.S.C. 1291; 72 Stat. 348.
28 U.S.C. 1651; 63 Stat. 102.
Presidential Libraries Act, 44 U.S.C. 2107; 82 Stat. 1288.
44 U.S.C. 2108(c); 82 Stat. 1289.

Rules:

Rule 26, Federal Rules of Civil Procedure.

Rule 6(e), Federal Rules of Criminal Procedure.

Rule 17(c), Federal Rules of Criminal Procedure.

Regulations:

Department of Justice Order No. 551–73 (November 2, 1973), 38 Fed. Reg. 30, 738, adding 38 C.F.R. ss 0.37, 0.38, and Appendix to Subpart G–1.

Department of Justice Order No. 554–73 (November 19, 1973), 38 Fed. Reg. 32, 805, amending 38 C.F.R. Appendix to Subpart G–1.

STATEMENT

This case presents for review an opinion and order of a federal district court holding that it has jurisdiction to intervene in a dispute between the President and the Special Prosecutor, jurisdiction to review a claim of privilege asserted by the President as to various executive materials, and jurisdiction to order the President, by compulsory process, to produce subpoenaed items for *in camera* review. Review is also sought of the lower court's order denying, without opinion, the President's motion to expunge from the record any finding by a grand jury that he was an unindicted co-conspirator in a criminal proceeding.

A. THE INDICTMENT

On June 5, 1972, a federal grand jury of the United States District Court for the District of Columbia was empanelled. To assist that grand jury, the President

voluntarily waived all claim of privilege as to the personal testimony of his advisors and aides on all Watergate-related matters. Following the decision in *Nixon* v. *Sirica,* 487 F. 2d 700 (D.C. Cir. 1973), the President provided the grand jury with numerous documents and other materials including tape recordings.

On March 1, 1974, the grand jury returned an indictment charging seven individuals with one count each of conspiracy, 18 U.S.C. 371 (J.R. 5a–39a).[2] Four of the defendants were also charged with counts of obstruction of justice, 18 U.S.C. 1503; making false statements to agents of the Federal Bureau of Investigation, 18 U.S.C. 1001; perjury, 18 U.S.C. 1621; and making false declarations to a grand jury or court, 18 U.S.C. 1623.[3]

On March 1, 1974, the grand jury also lodged a report with the district court which it filed under seal. In its accompanying report and recommendation, the grand jury stated that it had heard evidence bearing on matters within the primary jurisdiction of the Committee of the Judiciary of the House of Representatives and recommended that the sealed materials be submitted to the Committee. This material was sub-

[2] Those charged were Charles Colson, John Ehrlichman, H. R. Haldeman, Robert C. Mardian, John Mitchell, Kenneth W. Parkinson and Gordon Strachan.

[3] The validity of the entire indictment is presently being challenged by defendant Haldeman in the district court on the ground that the grand jury had been improperly continued past its term, and therefore had no authority at the time the indictment was returned. See H. R. Haldeman "Motion to Dismiss Indictment" filed May 1, 1974, in *United States* v. *Mitchell,* et al., (D.D.C. Cr. No. 74–110).

sequently transmitted to the Committee by order of the court dated March 18, 1974.[4]

Subsequently, it was learned that the grand jury in a separate report named, among others, Richard M. Nixon as an "unindicted co-conspirator."

B. THE SPECIAL PROSECUTOR'S SUBPOENA

On April 16, 1974, the Special Prosecutor, Leon Jaworski, moved the district court for an order pursuant to Rule 17(c), Federal Rules of Criminal Procedure, directing the issuance of a subpoena to Richard Nixon, President of the United States, for the production and inspection of certain presidential material. This material consists of tapes and other electronic and mechanical recordings or reproductions and any memoranda, papers, transcripts, and other writings, relating to 64 confidential conversations between the President and his closest advisors. (J. A. 42a–46a). This motion was subsequently joined in by three of the defendants, Robert C. Mardian, John D.

[4] The President declined to express his views on the propriety of the transmittal because in his view, such matters were within the court's own discretion. In its decision authorizing the transmittal of this material, however, the court noted that the grand jury report drew no accusatory conclusions, deprived no individual of an official forum in which to respond, was not a substitute for indictments where such indictments might properly issue, and contained no recommendations, advice, or statements that infringed on the prerogatives of the other branches of the government. *In Re Report and Recommendations of the June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C. 1974).

Ehrlichman, and Charles W. Colson, who is no longer a defendant in this proceeding.[5]

On May 1, 1974, the President, through his counsel, entered a special appearance and moved to quash the subpoena *duces tecum*. (J.A. 47a) A formal claim of privilege was filed by the President regarding the subpoenaed presidential materials with the exception of those portions of the conversations which had already been made public by the President. (J.A. 48a) On May 3, 1974, the Special Prosecutor moved the district court for an order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, authorizing the disclosure of matters occurring before the grand jury to the extent necessary to prepare its memorandum in response to the President's motion to quash. At an *in camera* hearing on May 6, 1974, the district court ruled that the grand jury material could be filed with the court under seal. On May 10, 1974, the Special Prosecutor submitted a memorandum in opposition to the motion to quash, accompanied by an appendix to support a claim of relevancy for the particular subpoenaed materials. (S.P.S.A.)[6] In part, the Special Prosecutor in this memorandum relied upon the finding by the grand jury that the President was an unindicted co-conspirator to establish the relevancy of many of the subpoenaed items and to overcome the presumptively privileged nature of the material as

[5] On June 3, 1974, Charles Colson plead guilty to the felony of obstruction of justice in violation of 18 U.S.C. 1503 in the case of *United States* v. *Ehrlichman et al.*, (D.D.C. Cr. No. 74–116).

[6] The reference "S.P.S.A." is to the Special Prosecutor's Sealed Appendix.

required by *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973).

On May 13, 1974, the President, through his counsel, filed a special appearance and motion to expunge the grand jury finding on the ground that such a finding was beyond the authority of the grand jury. (J.A. 3a) The President also submitted a point-by-point response to the Special Prosecutor's analysis of the relevancy of the subpoenaed materials. (P.S.A. 1–7)[7] Following oral arguments heard *in camera* on May 13, 1974, the Special Prosecutor filed a further memorandum under seal on May 17, 1974.

C. DISTRICT COURT'S OPINION

On May 20, 1974, the district court entered its opinion and order denying the President's motion to quash and his motion to expunge. The court further ordered the President to produce the subpoenaed materials together with an index and analysis of each item, and a copy of the tape of each portion of those conversations previously transcribed and published. (J.A. 3a)

Regarding its jurisdiction, the district court held that under *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the court had the authority to rule on the scope and applicability of executive privilege and that its jurisdiction was not affected by the intra-executive nature of the dispute, for the President was required to consult with congressional leaders prior to attempting to abridge the independence and authority granted to the Special Prosecutor. In the absence of such action, the court found it had jurisdiction to entertain

[7] The reference "P.S.A." is to the President's Sealed Appendix.

this suit. The district court did not, however, address itself to the question of whether the President had ever delegated to the Special Prosecutor his authority as Chief Executive to determine what materials would not be available to a federal prosecutor upon request, and in the absence of such a delegation on what basis the court had jurisdiction to intervene in the prosecutorial discretion of the President.

On the merits, the court ruled that the requirements of Rule 17(c) had been met and that the Special Prosecutor had demonstrated the "compelling need" required under *Nixon* v. *Sirica* to overcome the presumptively privileged nature of the presidential communications. Therefore, the court ordered the President or any subordinate officer with custody or control of the materials to deliver the subpoenaed items to the court on April 18, 1974. The district court denied, without opinion, the President's motion to expunge the finding of the grand jury that the President was an unindicted co-conspirator. (J.A. 3a)

D. SUBSEQUENT EVENTS

On May 24, 1974, the President filed a notice of appeal in the district court, docketed the appeal in the Court of Appeals for the District of Columbia Circuit (D.C. Cir. No. 74–1534), and filed therein under seal, a petition for a writ of mandamus (D.C. Cir. No. 74–1532). On May 24, 1974, the Special Prosecutor filed in this Court a petition for a writ of certiorari before judgment which was granted with expedited briefing schedule, by order of May 31,

1974.[8] The President, through his counsel, on June 6, 1974, filed under seal a cross-petition for a writ of certiorari before judgment which was granted by order of June 15, 1974.

On June 6, 1974, the President, through his counsel, also entered a special appearance and moved the district court to lift its protective order regarding the grand jury's naming of certain individuals as co-conspirators and to any additional extent deemed appropriate by the court on the grounds that public disclosure by the news media made the reasons for continuance of the protective order no longer compelling. By order of June 7, 1974, the district court removed its protective order. On June 10, 1974, the Special Prosecutor and counsel for the President jointly moved this Court to unseal those portions of the briefs and oral argument in the lower court which related to the action of the grand jury regarding the President. This Court denied that motion on June 15, 1974, except for the grand jury's immediate finding relating to the status of Richard M. Nixon as an unindicted co-conspirator.

The President's cross-petition for a writ of certiorari raised the issue of a grand jury's authority to charge an incumbent President as an unindicted co-conspirator in a criminal proceeding. In conjunction therewith, the President, through his counsel, on June 10, 1974, entered a special appearance and pursuant to Rule 6(e), Federal Rules of Criminal Proce-

[8] Unfortunately, the accelerated schedule under which this case is being argued has not permitted the kind of time for the precise and detailed preparation of briefs that Counsel feel the historic nature of both the case and occasion requires.

dure, moved the district court to disclose to the President any and all transcripts, tapes and recordings of Presidential conversations, grand jury minutes and exhibits, and any and all other matters occurring before the grand jury which pertained to the grand jury action in naming or authorizing the Special Prosecutor to identify Richard M. Nixon as an unindicted co-conspirator. It was requested that this material be transmitted as part of the record to this Court. This motion was denied by the district court on June 18, 1974.

On June 19, 1974, the President moved this Court to have the materials disclosed and transmitted to this Court in order that both the President and the Court would have the entire record upon which to present and decide this case.

INTRODUCTION

In a very real sense, every case that comes before this Court is unique; but few in the Nation's history have cut so close to the heart of the basic constitutional system in which our liberties are rooted.

Thus the stakes are enormously high, from a constitutional standpoint. At the same time, and making the Court's judgment more difficult, the case comes wrapped in the passions of a dramatic conflict which has dominated the Nation's headlines for more than a year. This is a conflict which now has involved all three branches of the Government, and pits their constitutional rights and responsibilities one against another.

Just as the first allegiance of this Court is to the Constitution, the first responsibility of this Court

must now be to decide the case before it in a way which preserves the balances that are central to the Constitution.

At its core, this is a case that turns on the separation of powers.

All other considerations are secondary, because preserving the integrity of the separation of powers is vital to the preservation of our Constitution as a living body of fundamental law. If the arguments of the Special Prosecutor were to prevail, the constitutional balance would be altered in ways that no one alive today could predict or measure.

The questions presented reach beyond the exigencies of the moment; beyond the needs of any particular criminal prosecution; beyond the interests of any particular Administration.

The extraordinary nature of this case stems partly from the issues directly presented, and partly from the coloration placed on those issues by the surrounding circumstances.

It would do justice neither to the parties nor to the issues if this were treated as just another case, or simply as an appeal from a discovery procedure in a criminal action against private individuals. It is, in fact, an extraordinary proceeding intrinscally related to the move now pending in the Congress to impeach the President of the United States.

In effect, court process is being used as a discovery tool for the impeachment proceedings—proceedings which the Constitution clearly assigns to the Congress, not to the courts. This is so because of the particular relationship which has evolved among the Special

Prosecutor, the district court and the House Judiciary Committee, and because of the impact which any presidential action with regard to the subpoenas issued would inevitably have on the impeachment proceedings. As a result of the history of the so-called Watergate cases in the district court, the Special Prosecutor is well aware that the district court feels obligated to turn over to the Judiciary Committee any information that might bear on the pending congressional action. Thus the effect, whatever the intent, of the discovery procedures being pressed by the Special Prosecutor would be to produce evidence for the Congress that the Congress could not obtain by its own procedures.

As a result, there has been a fusion of two entirely different proceedings: one, the criminal proceeding involving various individual defendants, and the other the impeachment proceeding involving the President. The first lies in the courts; the second lies in the Congress. The Special Prosecutor strengthens this fusion by utilizing the unsubstantiated, unprecedented and clearly unconstitutional device of naming the President as an unindicted co-conspirator in the criminal cases, with the apparent purpose of strengthening his claim to recordings of presidential conversations as potential evidence in the criminal cases.

Two processes—each with an entirely different history, function and structure—have become intertwined, and the resulting confusion, both conceptual and procedural, is manifestly unfair to the President as an individual and harmful to the relationship between his office and the legislative branch.

To place the present events in perspective, it is useful to reflect on how this case would have been viewed in normal times. If there were no impeachment pending, and if the Special Prosecutor used the device of naming the President as an unindicted co-conspirator in order to obtain recordings of private presidential conversations, on which the President had interposed a claim of executive privilege, the Special Prosecutor's request would be given short shrift.

If this procedure were allowed to go forward, inevitably affecting the impeachment inquiry, it would represent an expansion of the Court's jurisdiction into the impeachment process that the Constitution assigns solely to the House of Representatives. Whatever the combination of circumstances producing it, the result would be clear: an expansion of the Court's jurisdiction into a realm that the Constitution clearly prohibits. It follows necessarily that the courts may not be used, either deliberately or inadvertently, as a back-door route to circumvent the constitutional procedures of an impeachment inquiry, and thus be intruded into the political thicket in this most solemn of political processes.

Anyone who has practiced before this Court is familiar with the observation of Justice Holmes that "(g)reat cases, like hard cases, make bad law." This is true if the pressures of the moment allow the courts to be swayed from their rigid adherence to great principles; if remedies for the perceived passing needs of the moment are allowed at the expense of those enduring constitutional doctrines that have preserved our system of ordered liberty through the

ages. Of those doctrines, none is more fundamental to our government structure itself than the separation of powers—with all of its inherent tensions, with all of its necessary inability to satisfy all people or all institutions all of the time, and yet with the relentless and saving force that it generates toward essential compromise and accommodation over the longer term even if not always in the shorter term. Often a price has to be paid in the short term in order to preserve the principle of separation of powers, and thereby to preserve the basic constitutional balances, in the longer term. The preservation of this principle, the maintenance of these balances, are at stake in the case now before this Court.

SUMMARY OF ARGUMENT

The district court order of May 20, 1974, is an appealable order under 28 U.S.C. 1291, for unless review is granted now the President's claimed right will be irremediably lost. This Court also has jurisdiction to entertain and decide the petition for mandamus transmitted by the Court of Appeals under 28 U.S.C. 1651 because the lower court's decision exceeded that court's jurisdiction.

Under the doctrine of separation of powers, the Judiciary is without jurisdiction to intervene in the intra-branch dispute between the President and the Special Prosecutor. The duty to determine whether disclosure of confidential presidental communications is in the public interest has not been, and cannot be, delegated to the Special Prosecutor.

Under the standards set forth in *Baked* v. *Carr,* 369 U.S. 186 (1962), this intra-branch dispute raises

a political question which the federal courts lack jurisdiction to decide. The district court does not have the power to substitute its judgment for that of the President on matters exclusively within the President's discretion.

Inherent in the executive power vested in the President under Article II of the Constitution is executive privilege, generally recognized as a derivative of the separation of powers doctrine. The powers traditionally asserted by the other branches support the validity of the claim of confidentiality invoked by the President.

Even if this Court were to determine that a presidential privilege is subject to judicial supervision, the lower court erred in refusing to quash the subpoena since the Special Prosecutor failed to demonstrate the "unique and compelling need" required by *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973), to overcome the presumptively valid claim of presidential privilege.

However, even before a determination can be made as to whether the President's assertion of executive privilege is overcome, the Special Prosecutor has the burden of proving that his subpoena meets the requirements of Rule 17(c), Federal Rules of Criminal Procedure. An analysis of the showing made by Special Prosecutor in the court below demonstrates that he failed to meet the case law criteria developed to prevent abuse of Rule 17(c). For this reason alone the district court erred in refusing to quash the subpoena.

The President is not subject to the criminal process whether that process is invoked directly or indirectly.

The only constitutional recourse against a President is by impeachment and through the electoral process. The naming of the President as an unindicted co-conspirator by an official body is a nullity which both prejudices the ongoing impeachment proceeding and denies due process to the President. The grand jury's action does not constitute a *prima facie* showing of criminality and is without legal effect to overcome a presidential claim of executive privilege.

ARGUMENT

I. THIS COURT MAY REVIEW THE MAY 20, 1974, ORDER OF THE DISTRICT COURT BY EITHER ONE OF TWO ALTERNATIVE METHODS:

A. BY APPEAL PURSUANT TO 28 U.S.C. 1291

The district court order of May 20, 1974, denying the motion of Richard Nixon, President of the United States, to quash a subpoena *duces tecum* directed to him at the request of the Special Prosecutor is an appealable order under 28 U.S.C. 1291.[9]

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except

[9] Although this particular action springs from a criminal proceeding, it is a collateral matter of sufficient independence to warrant civil treatment under 28 U.S.C. 1291 and applicability of the reasoning of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), a civil case, and its progeny. See *Carroll* v. *United States*, 354 U.S. 394, 403, (1957). See also *United States* v. *Ryan*, 402 U.S. 530, 532 (1971).

> where a direct review may be had in the Supreme Court.

Under the criteria established by this Court for determining finality, it is clear that this order should be considered a "final order" and therefore subject to an immediate appeal. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court held that a denial of defendant-corporation's motion to compel the plaintiff-shareholder to produce security for payment of reasonable expenses incurred by the corporation in defense of the shareholder's derivative suit, should the plaintiff's claim fail, constituted an appealable order under 28 U.S.C. 1291. Justice Jackson explained the rationale of the Court:

> [T]his order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. (337 U.S. at 546).

Following this decision, the Court in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), reiterated its previous approach in this area and held appealable an order granting a motion to strike a particular cause of action (a second cause of action survived). In discussing appealability, Justice Black emphasized that "this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.'" 379 U.S. at 152. He further noted that "in deciding the question of finality

the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' " 379 U.S. at 152–153.

In light of the foregoing judicial precedent, this Court, on May 28, 1974, decided *Eisen* v. *Carlisle & Jacquelin*,—U.S.—(42 U.S.L.W. 4804, May 28, 1974). In *Eisen*, the plaintiff filed a class action on behalf of himself and all other odd-lot traders on the New York Stock Exchange charging various brokerage firms with numerous breaches of federal antitrust and securities laws. After a myriad of battles over the class action aspect, the district court finally held the suit maintainable as such an action. The brokerage firms appealed to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. 1291, over the plaintiff's vigorous objection of non-appealability. The Court of Appeals, for reasons irrelevant to this case, dismissed the suit as a class action. On further review, this Court met the issue of appealability head-on.

This Court, in concluding that the Court of Appeals had possessed jurisdiction under 28 U.S.C. 1291, relied upon *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). Justice Powell, speaking for the Court, called attention to two dispositive elements: (1) The order of the district court had *conclusively* determined, by rejection, the claim of the brokerage firms on the class action issue, and (2) That order was "a final disposition of a claim of right which is not an ingredient of the cause of action and does not require consideration with it," i.e. "it concerned a collateral matter that

could not be reviewed effectively on appeal from the final judgment." 42 U.S.L.W. at 4808–4809.

Applying these tests to the facts of this particular case in not difficult; neither is the result. The district court's order rejected the President's position, both on jurisdictional grounds and on the merits, and ordered the production of all subpoenaed items for an *in camera* inspection.[10] Therefore unless review is granted at this stage of the proceeding, the President's claimed right will be irremediably lost[11] because, as a non-party to the primary suit, he will not be able to appeal from the criminal judgment.[12] Moreover, if the

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[10] *United States* v. *Mitchell*, Cr. No. 74–110 (D.D.C. May 20, 1974) at pp. 3–7.

[11] In *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159, 162 (1973), Justice Douglas, speaking for a unanimous Court, held a judgment of the Supreme Court of North Dakota to be "final" even though that court had remanded the case to a state administrative board for further hearings; to do otherwise would have deprived the petitioner of a constitutional issue which would have been lost. Although decided under 28 U.S.C. 1254, dealing with review of state judgments, the decision and language reflected the traditional requirements of 28 U.S.C. 1291, set out in *Cohen*, *supra*. See *United States* v. *Ryan*, 402 U.S. 530, 532 (1971).

[12] In addition, the observation by the court in *Nixon* v. *Sirica*, 487 F. 2d 700, 721 n. 100 (D.C. Cir. 1973) is instructive: since the subpoenaed recordings will already have been submitted to the District Court, the opportunity to test the court's ruling in contempt proceedings would be foreclosed. Any ruling adverse to the Special Prosecutor would clearly be a pretrial "decision or order . . . suppressing or excluding evidence . . . in a criminal proceeding. . . ." Thus the District Court's rulings on particularized claims would be appealable by the Presidents as final judgments under 28 U.S.C. 1291 (1970), and by the Special Prosecutor under 18 U.S.C. 3731 (1970). See also the Order of June 18, 1974), in *Nixon* v. *Sirica* and *Jaworski*, (D.C. Cir. No. 74–1618).

materials requested are absolutely privileged, the irreparable nature of the injury resulting from disclosure cannot be questioned.

In a closely analogous case also involving the appealability of a ruling by a district court on a motion to quash a subpoena *duces tecum,* the Court of Appeals for the Fifth Circuit in *Caswell* v. *Manhattan Fire and Marine Insurance Co.,* 399 F. 2d 417, 422 (5th Cir. 1968), stated the following:

> Manhattan contends we are without jurisdiction to review this question. We disagree. Although an order granting or denying a motion to quash a subpoena is normally considered interlocutory and not subject to review by immediate appeal, such an order, like other discovery orders, may be assigned as error on appeal from a final judgment on the merits. See "Developments in the Law—Discovery," 74 Harv. L. Rev. 940, 992 (1961). A nonparty may appeal an order denying his motion to quash when under the circumstances he would be otherwise denied an effective mode of review. *Carter Products, Inc.* v. *Eversharp, Inc.,* 360 F. 2d 868 (7th Cir. 1966); *Covey Oil Co.* v. *Continental Oil Co.,* 340 F. 2d 993 (10th Cir.), *cert. denied,* 380 U.S. 964, 85 S. Ct. 1110, 14 L. Ed. 2d 155 (1965). Compare *Robinson* v. *Bankers Life & Cas. Co.,* 226 F. 2d 834 (6th Cir. 1965). *An order requiring a nonparty to produce documents often will be final insofar as the nonparty is concerned.* Moreover in many cases substantial prejudice may result from denying immediate appellate review. 399 F. 2d at 422. (emphasis added.)

For the above reasons, the same conclusion is mandated here. More recently, the Court of Appeals for the District of Columbia Circuit in *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), held that the district court's denial of the President's motion to quash a grand jury subpoena was reviewable under the All Writs Act, although the court did not discard "direct appeal as an alternative basis for review in the particular situation before us." 487 F. 2d at 707 n. 21. In addition, the court made particular reference to the unusual circumstances arising in an action involving the President, which further emphasize the critical need for appellate review at this stage of the proceeding:

> The final-order doctrine, as a normal prerequisite to a federal appeal, is not a barrier where it operates to leave the suitor "powerless to avert the mischief of the order." *Perlman* v. *United States*, 247 U.S. 7, 13, 38 S. Ct. 417, 419, 62 L. Ed. 950 (1918). In the case of the President, contempt of a judicial order—even for the purpose of enabling a constitutional test of the order—would be a course unseemly at best. (487 F. 2d at 707 n. 21).

Although there is, as a general rule, a need to avoid piecemeal litigation which may unduly hamper the efficient administration of the courts, *Alexander* v. *United States*, 201 U.S. 117 (1906), this practical consideration has always given way when the rights of an individual will be irreparably affected by delay. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152–153 (1964).

Under the circumstances presented, the district court's denial of the President's motion to quash is a final order, and is therefore appealable under 28 U.S.C. 1291.

B. BY ENTERTAINING AND DECIDING A PETITION FOR WRIT OF MANDAMUS TRANSMITTED BY A COURT OF APPEALS

We also submit that this Court has jurisdiction to entertain and decide the petition for mandamus transmitted by the court of appeals to this Court under 28 U.S.C. 1651. Pursuant to this Court's order granting the Special Prosecutor's petition for certiorari and the President's cross-petition for certiorari, the entire record before the court of appeals has been transmitted to this Court under the mandate of Rule 25 of the Rules of the Supreme Court of the United States.

The All Writs Statute of the Judicial Code of 1948, 28 U.S.C. 1651, provides that:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.
>
> (b) An alternative writ or *rule nisi* may be issued by a justice or judge of a court which has jurisdiction.

It is appropriate in the present case that this Court entertain and decide the petition for mandamus, because the order entered by the trial court demanding *in camera* inspection of the tape recordings is clearly erroneous and beyond that court's jurisdiction in that it purports to intervene in a wholly intra-executive

dispute. In addition, this Court's discretion to issue this extraordinary writ should be exercised at this stage of the proceedings because judicial action which would necessitate presidential involvement in a criminal contempt proceeding would be action totally insensitive to the role of the Office of the Presidency in our framework of government, without judicial benefits to be gained.

This Court in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260 (1957), recognized that there are instances when a judgment that is not final and appealable under 28 U.S.C. 1291 must be subject to further review so as not to result in an injustice, and Congress via 21 U.S.C. 1651 has provided an effective remedy. In determining what is "necessary or appropriate" within the scope of 21 U.S.C. 1651, it is clear that this section operates in aid of this Court's appellate jurisdiction, for in *Ex parte Peru*, 318 U.S. 578 (1943), this Court considered this question in relationship to the Judiciary Act of 1925, the predecessor of this Act, and concluded that:

> The jurisdiction of this Court to issue common law writs in aid of its appellate jurisdiction has been consistently sustained. The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so. Such has been the office of the writs when di-

> rected by this Court to district courts, both before the Judiciary Act of 1925 and since. (318 U.S. at 582–583).

This Court also stated that:

> The jurisdiction of this Court to issue such [common law writs], like its jurisdiction to grant certiorari, is discretionary. The definite aim of the 1925 Act was to enlarge, not to destroy, the Court's discretionary jurisdiction. That aim can hardly give rise to an inference of an unexpressed purpose to amend or repeal the statutes of the United States conferring jurisdiction on the Court to issue the writs, or an inference that such would have been the purpose had repeal been proposed. The exercise of that jurisdiction has placed no undue burden on this Court. (318 U.S. at 585).

Once having the power to grant this writ, we submit this is a most appropriate instance to exercise that power, for the above reasons. In its recent statement this Court reviewed many of the instances where the writ of mandamus has been used; however, none are as timely and imperative as the present case. In *Will* v. *United States,* 389 U.S. 90 (1967), Chief Justice Warren, speaking for the Court, stated:

> The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction', it is clear that only exceptional circumstances amounting to

a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy, *DeBeers Consol. Mines, Ltd.* v. *United States,* 325 U.S. 212, 217 (1945). Thus, the writ has been invoked where unwarranted judicial action threatened 'to embarrass the execution arm of the Government in conducting foreign relations,' *Ex parte Peru,* 318 U.S. 578, 588 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland* v. *Soper,* 270 U.S. 9 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States* v. *United States Dist. Court,* 344 U.S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249 (1957); see *McCullough* v. *Cosgrave,* 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp.* v. *James,* 272 U.S. 701, 706, 707 (1927) (dictum).
(389 U.S. at 95).

Thus, we submit that it is an appropriate exercise of jurisdiction under 28 U.S.C. 1651 for this Court to entertain a writ of mandamus transmitted to it by a Court of Appeals.

II. THE COURT LACKS JURISDICTION OVER AN INTERNAL DISPUTE OF A CO-EQUAL BRANCH [13]

Under the firmly established doctrine of separation of powers, the Judiciary is without jurisdiction to

[13] The Court should be advised that a difference of opinion exists between the Special Prosecutor and Special Counsel to the President as to the propriety of presenting this argument. The Special Prosecutor contends that as an inducement to his

intervene in the solely intra-executive dispute presented here. This entire dispute, between two entities within the executive branch of the government, concerns the prosecutorial discretion vested in the executive branch and involves only the issue of what executive materials should be available to aid in a criminal prosecution. In this respect, this case differs fundamentally from *Nixon* v. *Sirica* 487 F.2d 700 D.C. Cir. 1973), which involved a grand jury subpoena directed to the President and as such represented an inter-branch dispute.

The ultimate authority over all executive branch decisions is, under Article II of the Constitution, vested exclusively in the President of the United States. The President has neither waived nor delegated to the Special Prosecutor his duty to determine what confidential presidential documents shall be made available to another executive officer. Therefore, in the absence of a delegation of this duty, the President, as the chief executive officer, and not the Special

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accepting his position, he was provided free access to the courts to resolve any dispute with the President involving the claim of executive privilege. Special Counsel to the President has not been able to confirm that the President at any time agreed to forego any legal remedies available to him in opposing the efforts of the Special Prosecutor to obtain materials over which the President claimed executive privilege. Be that as it may, the jurisdiction of the court cannot be stipulated by the parties and counsel have a duty to call the attention of the court to the possible lack of jurisdiction. See discussion *infra* at pp. 43–44. See also the excellent discussion of this jurisdictional question published by Professor Bickel at an earlier stage of the Special Prosecutor's efforts to obtain presidential tape recordings. *The Tapes, Cox, Nixon*, The New Republic (September 29, 1973).

Prosecutor or the Judiciary, is and remains the final authority as to what presidential material may be utilized in the furtherance of any prosecution. Because the President has not delegated this duty and responsibility to the Special Prosecutor, it is unnecessary for this Court to even consider whether such a delegation of responsibility is constitutionally permissible. *United States* v. *Burr,* 25 F. Cas. 187, 192 No. 14694 (C.C.D. Va. 1807),[14] See also *Williams* v. *United States,* 1 How. (14 U.S.) 290, 297 (1843); *Runkle* v. *United States,* 122 U.S. 543, 557 (1887); *United States* v. *Fletcher,* 148 U.S. 84, 88 (1893); *French* v. *Weeks,* 259 U.S. 326, 334 (1922); 38 Op. Att'y. Gen. 457 (1936). Accordingly, this entire dispute is intra-executive in nature and beyond the jurisdiction of this Court.[15]

At the outset, we wish to make clear to the Court that we do not question the jurisdiction of the Court to resolve any disagreement or conflict between the various independent but co-equal branches of the government, *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137 (1803). Nor do we challenge the jurisdiction of the court to negate an act performed by one branch in excess of its constitutionally delegated authority. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). However, under the clearly enunciated

[14] In *Burr*, the Court specifically stated:

"In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him." (25 F. Cas. at 192.)

[15] We do not challenge the jurisdiction to a court to entertain a properly documented request by a defendant for exculpatory materials. *Brady* v. *Maryland*, 373 U.S. 83 (1963).

doctrine of separation of powers adopted by the Framers of the Constitution, we do challenge the authority of the court or any branch of the government to intervene in a solely intra-branch dispute, even at the request of a disputant, whether an individual member of that branch, an established committee, or a recognized department. Certainly, an intra-branch dispute, regardless of the context in which it arises, is within the exclusive jurisdiction of that body alone and can properly be resolved, if necessary, only by the constitutionally designated official or body vested with the ultimate responsibility for that branch of government.

The concept of separation of governmental powers is deeply rooted in the history of political theory, finding its early expression in the works of Aristotle [16] who recognized the fundamental distinction between the legislative, executive and judicial functions.[17]

Although subsequently elaborated upon by many historians and scholars, the principal of separation of the branches of government was most familiar to colonial America in the writings of Locke [18] and Montesquieu.[19]

In the most influential political work of its day, Montesquieu in *The Spirit of Laws* wrote:

> In every government there are three sorts of power: the legislative, the executive * * * the

[16] *Aristotle's Politics*, 197–198 (B. Jowett transl. 1943).

[17] The early history of the doctrine of separation, as set forth above, is from Forkosch, *Separation of Powers*, 41 U. Colo. L. Rev. 529 (1969).

[18] J. Locke, *An Essay Concerning the True Original Extent and End of Civil Government* (J. W. Gough, ed. 1947).

[19] Montesquieu, *The Spirit of Laws* (38 Great Books of the Western World, 1900).

> judiciary * * * When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; * * * Again, there is no liberty if the judicial power be not separated from the legislative and executive.
>
> Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything were the same men or the same body, whether of nobles or of the people to exercise all three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[20]

It was this philosophy that influenced the Framers of the Constitution as they began their task of developing a form of government that would survive change and crisis over the long future.[21]

Even prior to the opening days of the Constitutional Convention, the doctrine of separation had been accepted by the states. This is exemplified by the Constitution of the State of Massachusetts, adopted in 1780, which provided:

> Article XXX: In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial pow-

[20] *Id.* Bk XI, ch. 6 at 70.

[21] *The Federalist* No. 47 (J. Madison).

> ers or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.[22]

At the Constitutional Convention, the theory of separation was not seriously questioned. The tripartite form of government introduced by the Virginia proposal [23] was adopted in principle by the Convention [24] and referred to the Committee for Detail for implementation.[25] As described by the notes of James Wilson, the Committee set forth the tripartite principle and specifically stated that the legislative power of the United States shall be vested in Congress, the executive power in a single person, and the judicial power in a Supreme Court.[26] Following the submission of the Committee report to the full Convention, the structure and organization of the three branches were extensively debated but not the principle of separation itself. The separation doctrine as submitted by the Committee on Detail emerged from the debates intact and remained substantially unchanged by the Committee on Style.[27]

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[22] At the present time 40 state constitutions expressly provide for a separation of powers and the remaining states have provisions substantially identical to the United States Constitution, W. Dodd, *State Government*, 58 (2d ed. 1928); See also: Constitutions of Hawaii (1959) and Alaska (1959).

[23] 1 Farrand, *Records of the Federal Convention of 1787*, 20–21 (rev. ed. 1966); [hereinafter cited as *Farrand*].

[24] 1 *Farrand* 30–31.

[25] 2 *Farrand* 129.

[26] 2 *Farrand* 152, 171, 172.

[27] 2 *Farrand* 590, 597, 600.

Although it is clear that a system of checks and balances was incorporated into the structure to avoid a domination or usurpation of power by any one branch, it was equally clear that each branch would be free to carry on its own delegated functions free from interference by a coordinate branch. James Madison eloquently stated the sentiment, which pervaded the Convention: "If it be essential to the preservation of the liberty that the Legisl:Execut: & Judiciary powers be separate, it is essential to the maintenance of the separation, that they should be independent of each other." [28] In further emphasizing this concept of separation and independence, James Wilson wrote that the independence of each department requires that its proceedings "shall be free from the remotest influence, direct or indirect of either of the other two." [29]

The doctrine of separation of powers, as a vital and necessary element of our democratic form of government, has long been judicially recognized. *United States* v. *Klein,* 13 Wall (80 U.S.) 128 (1872). As early as 1879, this Court stressed the integrity and independence of each branch of the government, when it stated: "One branch of the government cannot encroach on the domain of another without danger." The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking Fund Cases,* 99 U.S. 700, 718 (1879). Since that time, the Court has continually reaffirmed this doctrine is an unbroken line of decisions. In *O'Don-*

[28] 2 *Farrand* 34.

[29] Andrews, 1 *The Works of James Wilson,* 367 (1896).

oghue v. *United States,* 289 U.S. 516 (1933) Justice Sutherland speaking for the Court stated:

> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly, or indirectly, to, the coercive influence of either of the other departments. (289 U.S. at 530).

Again two years later, the Court added:

> *The fundamental necessity of maintaining each of the three general departments of government, entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.* So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. *Humphrey's Executor* v. *United States,* 295 U.S. 602, 629–630 (1935) (emphasis added). See also: *Monaco* v. *Mississippi,* 292 U.S. 313 (1934); *National Ins. Co.* v. *Tidewater Co.,* 337 U.S. 582 (1949); *Marshall* v. *Gordon,* 243 U.S. 521 (1917).

It is this constitutional principle which establishes the most fundamental jurisdictional limitation on each of the three branches and prohibits each from inter-

vening in the discretionary powers constitutionally vested in another coordinate branch.

In specifically referring to the jurisdiction of the Judiciary, Chief Justice Warren stated in *Flast* v. *Cohen,* 392 U.S. 83 (1968),

> the jurisdiction of federal courts is defined and limited by Article III of the Constitution . . . [I]n part [that article] defines the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of the government. (392 U.S. at 94–95).

Stated more simply by Justice Story, neither of the departments in reference to each other "ought to possess directly or indirectly an overwhelming influence in the administration of their respective powers." [30]

This concept was elaborated by the Court in *Springer* v. *Philippine Islands,* 277 U.S. 189 (1927):

> Some of our state constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. See *Kilbourn* v. *Thompson,* 103 U.S. 168, 190–191 and this separation and the consequent exclusive character of the powers conferred upon each of

[30] *The Federalist* No. 48 (J. Madison) cited in 1 Story, *The Constitution* 530 (4th ed.).

> the *three departments is basic and vital—not merely a matter of governmental mechanism* . . .
>
> It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise explicitly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubts upon, *the generally inviolate character of this basic rule.* 277 U.S. at 201–202 (emphasis added).

It is therefore evident that the district court had no jurisdiction to settle or intervene in an intra-executive disagreement relating to the evidentiary material to be made available from one executive department to another. The settlement of such a dispute in all circumstances is within the exclusive jurisdiction of the chief executive officer, for as this Court stated in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935):

> So much is implied in the very fact of the separation of powers of these departments by the Constitution, and in the rule which recognizes the essential co-equality. The sound application of the principal that makes one master in his own house precludes him from imposing his

> control in the house of another who is master there. (295 U.S. at 629–630).

The district court's lack of jurisdiction here is illustrated by a simple analogy. If two congressional committees simultaneously claim jurisdiction over a particular bill, it is unlikely that anyone would question that their sole recourse is an appeal to the congressional committee designated to resolve such disputes, or in its absence, to the Speaker of the House. It is inconceivable that any court would conclude that it had jurisdiction to resolve the matter, even if one or both of the disputants were to appeal to the Judiciary.

Similarly, within the executive branch, if an Assistant United States Attorney seeking information to bolster his case against an individual, were denied access to executive documents by either the Attorney General or the President, he could not properly seek assistance from the Judiciary, for a court would have no jurisdiction in the matter. The same result is mandated here, for as this Court clearly stated in *Kilbourn* v. *Thompson,* 103 U.S. 168, 190 (1880):

> It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

In attempting to negate this fundamental jurisdictional limitation, the Special Prosecutor relies heavily upon this Court's decision in *United States* v. *Interstate Commerce Commission,* 337 U.S. 426 (1949) for

the proposition that the Judiciary does have jurisdiction to intervene in this dispute. However, that case is plainly inapplicable for it did not involve an intra-branch dispute. On the contrary, there the Department of Justice, on behalf of the executive branch, brought suit against various independent railroads, and on appeal the Commission, a creation of the legislative branch, was joined as a party defendant. Under those circumstances, this Court had jurisdiction to resolve the dispute, for the ICC has been firmly recognized as an administrative body created by Congress to carry into effect its legislative policies and, like the Federal Trade Commission, "cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." *Humphrey's Executor* v. *United States,* 295 U.S. 602, 628 (1935). Consequently, that dispute was plainly inter-branch in nature, and therefore within the Court's jurisdiction to resolve controversies arising among the various branches. That case does not, however, in any way support the proposition that the court has jurisdiction to entertain a solely intra-executive dispute for the Office of Special Prosecutor, unlike the Commission, was created by the executive branch, within the executive branch, and performs solely executive functions.

In this instance, there can be no question that under the doctrine of separation of powers, the Court lacks jurisdiction to intervene in an intra-executive dispute concerning the availability and use of executive documents to assist in the prosecution of

any individual charged with criminal conduct. As the Judiciary has long recognized, under Article II, section 3 of the Constitution, it is the exclusive prerogative of the executive branch, not the Judiciary, to determine whom to prosecute, on what charges, and with what evidence or information. *Confiscation Cases,* 7 Wall (74 U.S.) 454 (1869); *United States* v. *Cox,* 342 F. 2d 167 (5th Cir), *cert. denied,* 381 U.S. 935 (1965); *Smith* v. *United States,* 375 F. 2d 243, 247 (5th Cir. 1967); *District of Columbia* v. *Buckley,* 128 F. 2d 17 (1942); *Pugach* v. *Klein,* 193 F. Supp. 630 (S.D.N.Y. 1961); and *In Re Grand Jury January 1969,* 315 F. Supp. 662 (D. Md. 1970). Under the Constitution, the President, as the highest executive officer, was expressly delegated all prosecutorial authority when he alone was vested with the responsibility "to take care that the laws be faithfully executed." In *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 164–166 (1803), Chief Justice Marshall expressed the views of the Court as to its jurisdiction to intervene in the authority constitutionally delegated to the President.

> By the Constitution of the United States, the President is invested wiith certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> In such cases, their acts are his acts; and whatever opinion may be entertained of the

> manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. *The subjects are political: they respect the nation, not individual rights, and being instrusted to the executive, the decision of the executive is conclusive.* (1 Cranch at 165–166) (emphasis added).

Thus, the courts have uniformly recognized that under the Constitution, the Judiciary was given no role in determining any matters within the executive's prosecutorial discretion. As demonstrated in *United States* v. *Cox,* 342 F. 2d 167 (5th Cir.) *cert. denied,* 381 U.S. 935 (1965), even when the executive branch determines, in the face of a grand jury finding of probable cause, that it will not prosecute a particular individual, the courts lack jurisdiction to intervene. In discussing the "absolute and exclusive discretion" of the executive branch in such matters, Judge Wisdom of the United States Court of Appeals for the Fifth Circuit stated in *United States* v. *Cox:*

> [W]hen, within the context of law-enforcement, national policy is involved, because of national security, conduct of foreign policy, or a conflict between two branches of government, the appropriate branch to decide the matter is the executive branch. The executive is charged with carrying out national policy on law-enforcement and, generally speaking, is informed on more levels than the more specialized judicial and legislative branches. In such a situation, a decision not to prosecute is analogous to the exercise of executive privilege. The executive's absolute and exclusive discretion to prosecute

> may be rationalized as an illustration of the doctrine of separation of powers, but it would have evolved without the doctrine and exists in countries that do not purport to accept this doctrine. (concurring opinion) (342 F. 2d at 193).

A fortiori, if it is solely an executive decision to prosecute, it follows that the courts are equally powerless to determine what material within the executive branch must be used in the case. Such a decision is exclusively within the power delegated by the Constitution to the Chief Executive; and the right of the Chief Executive to determine what presidential material shall or shall not be used in the furtherance of this or any prosecution has not been delegated to the Special Prosecutor.

If the President were interfering with a power that had been delegated to the Special Prosecutor, the conclusion of the district court that the President must, under 38 Fed. Reg. 30,738, first consult congressional leaders before taking such action might have been correct. However, it is absolutely clear from the regulation governing the authority of the Special Prosecutor, that the President has not delegated to the Special Prosecutor or any subordinate official, his duty to determine the privileged nature and use of executive material. Therefore, the district court plainly erred in asserting that it had jurisdiction to intervene in this suit on the ground that the President was abridging the independence of the Special Prosecutor over matters that were delegated to him. Moreover, it is unnecessary for this Court to specu-

late on the jurisdictional basis for this suit if the President, had, in fact, delegated his right and responsibilities concerning executive materials to the Special Prosecutor.

On November 27, 1973, Acting Attorney General Bork recreated the Office of Special Prosecutor and delegated to it his authority over all Watergate-related matters. The terms of this delegation are set forth in 38 Fed Reg. 30,738 (November 7, 1973) and the letter of Acting Attorney General Bork to Mr. Leon Jaworski, dated November 21, 1973. In accordance with that agreement, the President has not in the past nor does he here challenge those powers that were given to the Special Prosecutor in Watergate-related matters, including the right to conduct grand jury and other investigations, review documentary evidence available, and determine within the confines of the Constitution whom to prosecute and on what charges. Moreover, all decisions relating to the procedural aspects of prosecution including the right to request immunity for any witness are within the scope of his authority. In these and other areas delegated to him, the Special Prosecutor has had and continues to have complete independence.

However, as the agreement clearly shows on its face, the President has neither waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials, confidential in nature, which fall within the President's inherent authority to refuse to disclose to any executive officer. Nor did Acting Attorney General Bork attempt to delegate such

authority to the Special Prosecutor.[31] On the contrary, the authority granted to the Special Prosecutor by then Acting Attorney General Bork in this regard was specifically limited to at most: "determin[ing] whether or not to contest the assertion of executive privilege or any other testimonial privilege." 38 Fed. Reg. 30,739 (1973).

From this provision, it is abundantly clear that the President has not waived or delegated to the Special Prosecutor his duty to determine within his discretion what executive materials were privileged. Since this decision was retained by the President and falls within the normal scope of his prosecutorial discretion over all criminal cases, the courts are powerless to intervene, even at the request of the Special Prosecutor.

Moreover, the court's fundamental lack of jurisdiction to intervene in the President's prosecutorial discretion or any other executive decision within the realm of his constitutionally delegated authority, was not altered by the arrangement between Acting Attorney General Bork and Mr. Jaworski allowing the Special Prosecutor to determine what testimonial privileges to challenge. It is an elementary rule of jurisdiction, that where the courts constitutionally lack jurisdiction to intervene in a decision, as they do in all decisions concerning prosecutorial discretion, such jurisdiction can neither be waived nor conferred by an

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[31] It should be noted that had Acting Attorney General Bork attempted to delegate this right to the Special Prosecutor such a grant of authority would have been void, for the Attorney General himself has never had authority to override or challenge a decision by the Chief Executive and therefore could not delegate such authority to another.

agreement between the parties. *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934); *Industrial Addition Association* v. *I.R.S.*, 323 U.S. 310 (1945). Accordingly, even a decision by Mr. Jaworski that he wishes to contest a claim of privilege, either executive or testimonial, will not confer jurisdiction on the court.

Therefore, because the President in all criminal proceedings has the right to determine what confidential or sensitive material should not be used to assist a federal prosecutor, as this right was not delegated to the Special Prosecutor, the court remains without jurisdiction to intervene in his prosecutorial decision by the Chief Executive.

III. THIS INTRA-BRANCH DISPUTE DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III, SEC. 2 OF THE CONSTITUTION

We submit that the prior argument is dispositive of those questions presented to this Court by the Special Prosecutor and mandates that the district court order be vacated. However, should the Court determine that it does have jurisdiction to entertain this suit, it should of is own authority decline to do so, for a resolution of the fundamental issue as to whether it best serves the public interest to disclose presidential material, if not absolutely privileged, would require the Court to resolve a political question.

Underlying the doctrine of political question, is the fundamental notion that many controversies brought before the Court are best resolved by another branch of the government which possesses the necessary familiarity and expertise. This dispute raises a ques-

tion of justiciability because it involves a political dispute solely between two officials of the executive branch—the President and a lesser official, the Special Prosecutor. Under Article III, Section 2 of the Constitution, the judicial branch does not have the constitutional power to resolve such a political question.

Courts have struggled to establish criteria that would enable them to identify and uniformly deal with political questions. Such criteria have been elusive. *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 164–166 (1803); *Coleman* v. *Miller,* 307 U.S. 433, 454–455 (1939); *Poe* v. *Ullman,* 367 U.S. 497, 508 (1961); and *Flast* v. *Cohen,* 392 U.S. 83 (1968).

It was not until *Baker* v. *Carr,* 369 U.S. 186 (1962), however, that the Court finally succeeded in isolating and articulating a set of criteria for identifying an issue that presents a political question. The Court said:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment

> from multifarious pronouncements by various departments on one question. (369 U.S. at 217).

It is very clear that the Special Prosecutor's request that the district court overrule the legitimate invocation of executive privilege posed a nonjusticiable political question that meets the criteria established in *Baker*. There are no judicially discoverable standards or manageable criteria by which the courts could resolve this political question. The court below was asked to make an initial policy determination that the President has improperly or mistakenly invoked executive privilege against the Special Prosecutor. Such a determination by the lower court is constitutionally impermissible and violates the basic tenets of the separation of powers. Moreover, it is a determination beyond judicial abilities since the Court simply cannot substitute its judgment for that of the President. *Baker* is clear and compelling on this proposition and requires, in this case, recognition that the indicia of nonjusticiability are present.

Moreover, the matter before this Court is a nonjusticiable political question because it arises out of a President exercising a textually demonstrable grant of power from Article II of the Constitution.[32]

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[32] Textually demonstrable grants of power are both explicit and implied in Article II of the Constitution. The Supreme Court has stated:

"It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the Constitution. But what is the fact? There is not in the

Any determination concerning the disclosure of presidential documents necessarily requires the exercise of the unique discretion and expertise of the Chief Executive, for such a decision involves "considerations of policy, considerations of extreme magnitude, and certainty, entirely incompetent to the examination and decision of a court of justice." *Ware* v. *Hylton,* 3 Dall. (3 U.S.) 199, 260 (1796). Only the President is in a position to determine which communications must be maintained in confidence, for the public interest in this matter is a judgment only the President can make. It involves a complex blend of policy, perspective, and knowledge uniquely within the province of the President and the executive branch. Neither the courts nor Congress can claim for themselves the elements of knowledge and perspective necessary to examine and review such a decision.

Gilligan v. *Morgan,* 413 U.S. 1 (1972), confirms the continuing validity of the concept of justiciability; in that case Chief Justice Burger said:

> . . . because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise. The voting rights cases, indeed, have represented the Court's efforts to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes, not the assumption of a

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whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate." (*Anderson v. Dunn*, 6 Wheat [19 U.S.], 204, 225–226 [1821].) See also, *New York Times* v. *United States*, 403 U.S. 713, 752 n.3 (1971) (Burger, C. J. dissenting).

> continuing judicial review of substantive political judgments entrusted expressly to the coordinate branches of government. (413 U.S. at 11.).

Indeed, in recent political cases with political overtones such as *Powell* v. *McCormick*, 395 U.S. 486 (1969) and *Committee For Nuclear Responsibility* v. *Seaborg*, 463 F. 2d 788 (D.C. Cir. 1971), the issues related to the court's traditional role of interpreting the Constitution or legislation, vis-a-vis the constitutional rights of individuals, and thus are distinguishable from cases which concern discretionary decision-making by a coordinate branch of government.

This Court's resolution of this constitutional confrontation should not restrict the powers of the President by superimposing the decision of a subordinate in the executive branch over the Chief Executive through the impermissible intervention of the judicial branch. Rather, if any action is taken at all, the sole appropriate procedure for the consideration of alleged abuses is by way of impeachment. See *Ex Parte Grossman*, 267 U.S. 87, 121(1925).

IV. A PRESIDENTIAL ASSERTION OF PRIVILEGE IS NOT REVIEWABLE BY THE COURT

A. THE SEPARATION OF POWERS DOCTRINE PRECLUDES JUDICIAL REVIEW OF THE USE OF EXECUTIVE PRIVILEGE BY A PRESIDENT

Justice Douglas, at the threshold of his dissent in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 105 (1973), remarked that "The starting point of a decision usually indicates the result." In this case,

the foundation for the President's assertion of executive privilege is the Constitution.

The Constitution as the embodiment of the grand design of our political system was described in *Kilbourn* v. *Thompson,* 103 U.S. 168, 190–191 (1880), as follows:

> It is believed to be one of the chief merits of the American system of written constitutional law, that all powers entrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined.

The doctrine of the separation of powers, inherent in the nature of our government,[33] was reflected in the Constitution by the definitive expression of the Framers of each of the separate, co-equal branches. In the case at hand, Art. II, sec. 1, cl. 1 is in focus:

> The executive Power shall be vested in a President of the United States of America.

Inherent in that executive power, as part and parcel of the separation of powers, is executive privilege; in this case, more accurately described as presidential privilege. Unless this is so, the full panoply of power embodied in the executive power, would be, in reality,

[33] Cf. E. Corwin, *Introduction to Congressional Research Service, The Constitution of the United States of America* XII (1973).

greatly diluted, a concept at odds with the intent of the Framers of the Constitution.[34, 35]

A second parallel source of presidential privilege lies in the common law and its embodiment of the concept of confidentiality as a prerequisite to the effective administration of government. Rather than sapping vitality from our constitutional position, the common law, as described, adds increased force and dimension to it.[36]

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[34] Unlike its companion privilege attendant upon the Congress by virtue of the Speech and Debate Clause, executive privilege was not meticulously delineated by the Framers of our Constitution. Its nature as a constitutional privilege, however, is not undermined by that fact. See *Kilbourn* v. *Thompson*, 103 U.S. 168, 189 (1880); see also *Inland Waterways* v. *Young*, 309 U.S. 517, 525 (1940); *United States* v. *Midwest Oil*, 236 U.S. 459, 483, 505 (1915).

[35] We suggest an additional constitutional source of presidential privilege resides in Article II, sec. 1, cl. 8;

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

The duty of the holder of the Office of the President to preserve, protect, and defend the Constitution compels care that Article II, sec. 1, cl. 1 be fully defended from encroachment.

[36] Judge Wilkey, dissenting in *Nixon* v. *Sirica*, 487 F. 2d 700, 763 (D.C. Cir. 1973), succinctly stated:

"The oldest source of Executive Branch privilege, the common sense-common law privilege of confidentiality, existed long before the Constitution of 1789, and might be deemed an inherent power of any government."

This case is important, both to the parties involved and the citizenry at large. "The men and issues were large" [37] in 1807 when the Aaron Burr cases [38] were before Chief Justice Marshall and they are equally so here. Significantly, the precise issue of the "absoluteness" of executive privilege, as applied to presidential communications, has never been squarely confronted and definitively resolved by this Court. This Court's thoughtful consideration of the issues presented is of particular importance because the foundation of the district court's decision,[39] *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), rested upon a surface assessment that purely social or public policy considerations, as opposed to the Constitution, constituted the rationale for the privilege. 487 F. 2d at 712. As a result, the dimensions of presidential privilege have been miscalculated and its integrity impaired.

The Presidency, as the repository of the executive power of the United States, was forged out of intense controversy during the Constitutional Convention.[40] The debate is well-described by Clinton Rossiter:

> The progress of the Convention toward this decision was labored and uncertain, however, and it often seemed that the hard lessons of the

[37] See dissenting opinion of Judge Wilkey in *Nixon* v. *Sirica*, 487 F. 2d 700, 768 (D.C. Cir. 1973).

[38] *United States* v. *Burr*, 25 F. Cas. 30, No. 14692d (C.C.D. Va. 1807). *United States* v. *Burr*, 25 F. Cas. 187, No. 14694 (C.C.D. Va. 1807).

[39] *United States* v. *Mitchell*, Cr. No. 74–110 (D.D.C. 1974) at 3, 7.

[40] See Congressional Research Service, *The Constitution of the United States of America* 429–433 (1974).

> previous decade would be wasted on a majority of the delegates. Persistent voices were raised against almost every arrangement that eventually appeared in Article II and Wilson and his colleagues were able to score their final success only after a series of debates, decisions, reconsiderations, references to committees, and private maneuvers that still leave the historian befuddled. I have followed the tortuous progress of the incipient Presidency through Madison's *Notes* four times, and I am still not sure how the champions of the strong executive won their smashing victory. It can be said for certain, however, that at least eight decisions on the structure and powers of the executive were taken at different stages of the proceedings, and that out of these arose the Presidency. Everyone of these decisions, with one partial exception that history was shortly to remedy, was taken in favor of a strong executive.[41]

The result of these deliberations was to create an officer who is Chief of State, Chief Executive, Chief Diplomat and Commander-in-Chief.[42] Because of the great role entrusted to the presidency by the Constitution and because the President alone is representative of the whole country,[43] there are important respects in which he is not treated by the law in the

[41] C. Rossiter, *The American Presidency* 55 (1956).

[42] *Id.* at 16.

[43] Lest the President's position be misunderstood, it must be stressed we do not suggest that the President has the attributes of a king. *Inter alia*, a king rules by inheritance and for life. See A. Hamilton, *The Federalist*, No. 69; 3 *Farrand* 301–302; Letter of Pierce Butler, dated May 5, 1788, to Weedon Butler, an English subject.

same fashion as are others.[44] The President is not above the law—but he is responsible to the law in a specific fashion that the Framers, with utmost care, wrote into the Constitution. That historical perspective serves to define the stark language of Article II, section 1, clause 1, that "the executive Power shall be vested in a President * * *" Judge MacKinnon, in his dissenting opinion in *Nixon* v. *Sirica,* 487 F. 2d 700, 750 (D.C. Cir. 1973), described the relationship between the exercise of that executive power and the doctrine of executive privilege:

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[44] This fact was recognized by Justices Warren and Douglas, in dissent, in *Barr* v. *Matteo*, 360 U.S. 564, 582–583 (1959), a controversy involving issues of executive immunity:

> *Spalding* v. *Vilas*, *supra*, presents another situation in which absolute privilege may be justified. There the Court was dealing with the Postmaster General—a Cabinet Officer personally responsible to the President of the United States for the operation of one of the major departments of government. Cf. *Glass* v. *Ickes*, 73 App. D.C. 3, 117 F.2d 273; *Mellon* v. *Brewer*, 57 App. D.C. 126, 18 F.2d 168. The importance of their positions in government as policymakers for the Chief Executive and the fact that they have the expressed trust and confidence of the President who appointed them and to whom they are personally and directly responsible suggest that the absolute protection partakes of presidential immunity. Perhaps the *Spalding* v. *Vilas* rationale would require the extension of such absolute immunity to other government officials who are appointed by the President and are directly responsible to him in policy matters even though they do not hold Cabinet positions. But this extension is not now before us, since it is clear that petitioner Barr was not appointed by the President nor was he directly responsible to the President. Barr was exercising powers originally delegated by the President to the Director of Economic Stabilization who redelegated them to the Director of Rent Stabilization (footnote omitted).

> The effective discharge of the presidential duty faithfully to execute the laws requires a privilege that preserves the integrity of the deliberative processes of the executive office. It would be meaningless to commit to the President a constitutional duty and then fail to protect and preserve that which is essential to its effective discharge. Thus the term "effective" is the *sine qua non* that imbues the presidential decisional process with a constitutional shield. The genius of our Constitution lies, perhaps as much as anywhere, in the generality of its principles which makes it susceptible to adaptation to the changing times and the needs of the country. But this much is explicit: '[The President] shall take Care that the Laws be faithfully executed. . . .' U.S. Const. art. II § 3. Is it plausible that the Framers should have charged the President with so basic a responsibility, one upon which every ordered society is premised, and yet left him without that ability effectively to satisfy the high charge? Emphatically, the answer must be, 'No.' The duty and the means of its discharge coalesce and each, the one explicit and the other implicit, finds its source in the Constitution.

Executive privilege as claimed by this President, has been asserted by Presidents beginning with George Washington, just as the legislative and judicial branches have continually asserted and jealously guarded their respective "privileges." The initial invocation occurred when in 1792, the House of Representatives passed a resolution requesting military papers pertaining to the campaign of Major General St. Clair. Although the papers were apparently pro-

duced,[46] the consideration given to that request is illustrative:[46]

> First, that the House was an inquest, and therefore might institute inquiries. Second that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: *consequently were to exercise a discretion.* Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President. (emphasis added).

Since then, Presidents[47] and Attorneys General have asserted the privilege. Even more important is the fact that Presidents have always acted on the assumption that it is discretionary with them alone, to determine whether the public interest permits production of presidential papers, and the other branches

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[46] 1 P. Ford, *The Writings of Thomas Jefferson* 303–305 (1893).

[46] 3 *Annals of Congress* 493; 1 P. Ford, at 303–304.

[47] In 1948, President Truman, railing against an anticipated bill from a Republican Congress that would have required every President to produce confidential information even though the President might consider compliance to be contrary to the public interest, had a Memorandum prepared to demonstrate the bill's unconstitutionality. Part of that Memorandum follows:

Resume and Conclusions

A bird's-eye view of the refusals by seventeen of our Presidents, and their heads of departments, to comply with

of Government have until recently accepted this position. *Senate Select Committee on Presidential Campaign Activities* v. *Richard M. Nixon*. Slip Op. No.

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congressional requests for information and papers from the Executive, beginning with 1796 to the present time, follows:

President	Date	Type of Information Refused
George Washington	1796	Instruction to U.S. Minister concerning Jay Treaty.
Thomas Jefferson	1807	Confidential information and letters relating to Burr's conspiracy.
James Monroe	1825	Documents relating to conduct of naval officers.
Andrew Jackson	1833	Copy of paper read by President to heads of departments relating to removal of bank deposits.
	1835	Copies of charges against removed public official.
	1835	List of all appointments made without Senate's consent, since 1829, and those receiving salaries, without holding office.
John Tyler	1842	Names of Members of 26th and 27th Congress who applied for office.
	1843	Report to War Department dealing with alleged frauds practiced on Indians, and Col. Hitchcock's views of personal characters of Indian delegates.
James K. Polk	1846	Evidence of payments made through State Department, on President's certificates, by prior administration.
Millard Fillmore	1852	Official information concerning proposition made by King of Sandwich Islands to transfer Islands to U.S.
James Buchanan	1860	Message of Protest to House against Resolution to investigate attempts by Executive to influence legislation.

74–1258 (D.C. Cir. May 23, 1974); *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973). The opinions over

President	Date	Type of Information Refused
Abraham Lincoln	1861	Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.
Ulysses S. Grant	1876	Information concerning executive acts performed away from Capitol.
Rutherford B. Hayes	1877	Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as Collector of Port of New York.
Grover Cleveland	1886	Documents relating to suspension and removal of Federal officials.
Theodore Roosevelt	1909	Attorney General's reasons for failure to prosecute U.S. Steel Corporation, Department of Commerce.
Calvin Coolidge	1924	List of companies in which Secretary of Treasury Mellon was interested.
Herbert Hoover	1930	Telegrams and letters leading up to London Naval Treaty.
	1932	Testimony and documents concerning investigations made by Treasury Department.
Franklin D. Roosevelt	1941	Federal Bureau of Investigation reports.
	1943	Director, Bureau of the Budget, refused to testify and to produce files.
	1943	Chairman, Federal Communications Commission, and Board of War Communications refused records.
	1943	General Counsel, Federal Communications Commission, refused to produce records.
	1943	Secretaries of War and Navy refused to furnish documents, and permission for Army and Naval officers to testify.
	1944	J. Edgar Hoover refused to give testimony and to produce President's directive.

a long period of years by the highest legal officer [45] in the Government cannot be lightly disregarded. The fact that the litigation arising out of the Watergate investigations is the first time that a subpoena has been directed to force production of presidential papers since Colonel Burr's abortive attempt to subpoena documents from President Jefferson is because it has been universally accepted that there is no power

President	Date	Type of Information Refused
President Truman	1945	Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee.
	1945	President's directive did not include any files or written material.
	1947	Civil Service Commission records concerning applicants for positions.

Note: Truman Memorandum at 44 a, b, c (1948).

In the bird's-eye picture, reference is made to the refusals of Presidents Monroe, Fillmore, Lincoln, and Hayes[;] Monroe's refusal may be found in a message dated January 10, 1825, 2 Richardson, *Messages and Papers of Presidents*, p. 278' [sic] Fillmore's in 5 Richardson, p. 159; Lincoln's in 6 Richardson p. 12, and the refusal in Hayes' administration is dealt with in 17 Cong. Rec. 2332 and 2618.

(In addition, it appears President Kennedy exercised executive privilege four times, the Johnston Administration twice, and, through March 28, 1973, the Nixon Administration fifteen times, four of which were actually claimed by the President. 119 Cong. Rec. 2244–2245 (daily ed. March 28, 1973).

[45] See 11 Op. Att'y Gen. 137, 142–143 (1865) (Atty. Gen. Speed); 20 Op. Att'y Gen. 557, 558 (1893) (Atty. Gen. Olney); 25 Op. Att'y Gen. 326, 331 (1905) (Atty. Gen. Moody); 40 Op. Att'y Gen. 45, 49 (1941) (Atty. Gen., later Justice Jackson).

to compel the President in the exercise of his discretion. Uninterrupted usage continued from the early days of the Republic is weighty evidence of the proper construction of any clause of the Constitution. *Inland Waterways Corp.* v. *Young,* 309 U.S. 517, 525 (1940). Justice Lamar, in *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 472-473 (1915), observed:

> Both officers, lawmakers and citizens naturally adjust themselves to any long continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into regular practices. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of the statute or the exercise of a power, weight should be given to the usage itself—even when the validity of the practice is itself the subject of investigation.

The significance and rationale for this uninterrupted assertion of privilege by holders of the Office of the Presidency, are underscored by reference to the way in which the other co-equal branches of government have regarded the need for confidentiality. Chief Justice Burger, in *New York Times* v. *United States,* 403 U.S. 713, 752 n. 3 (1971), in his dissent, revealed his assessment of privilege:

> With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce

> the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

Although Professor Arthur Selwyn Miller and a collaborator have recently argued to the contrary, Miller & Sastri, *Secrecy and the Supreme Court: On The Need For Piercing the Red Velour Curtain,* 22 Buff. L. Rev. 799 (1973), it has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality. Justice Brennan has written that Supreme Court conferences are held in "absolute secrecy for obvious reasons." Brennan, *Working at Justice,* in *An Autobiography of the Supreme Court* 300 (Westin ed. 1963). Justice Frankfurter had said that the "secrecy that envelops the Court's work" is "essential to the effective functioning of the Court." Frankfurter, *Mr. Justice Roberts,* 104 U. Pa. L. Rev. 311, 313 (1955).

Congress, too, has seen fit to hold to such a privilege. It is a long established practice of each House of Congress to regard its own private papers as privileged. No court subpoena is complied with by the Congress or its committees without a vote of the House concerned to turn over the documents. *Soucie* v. *David,* 448 F. 2d 1067, 1081–1082 (D.C. Cir. 1971). This practice is insisted on by Congress even when the result may be to deny relevant evidence in a criminal pro-

ceeding either to the prosecution or to the accused person.[49]

Similarly, when President Kennedy refused to disclose to a Senate Subcommittee the names of Defense Department speech reviewers, the Subcommittee,

[49] See e.g., 108 Cong. Rec. 3626 (1962), showing Senate adoption of a resolution permitting staff members and former staff members of a Senate Committee to appear and to testify in a criminal proceeding against James Hoffa but forbidding them from taking any documents or records in the custody of the Senate and from testifying about information that they gained while employed in the Senate. In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of Government, which it wishes to protect." *Id.* at 3627.

On July 16, 1970, counsel for 1st Lt. William L. Calley, Jr., moved in his court-martial proceeding for production of testimony concerning the My Lai incident that had been presented to a subcommittee of the House Committee on Armed Services in executive session. Calley claimed that his testimony would be exculpatory of him and would help him establish his defense in the court-martial. The subcommittee Chairman, Rep. F. Edward Hebert, refused to make the testimony available, advising defense counsel on July 17, 1970, that Congress is "an independent branch of the Government, separate from and equal to the Executive and Judicial branches," and that accordingly only Congress can direct the disclosure of legislative records. He concluded from this that the material requested by the defense was not within the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), nor subject to the requirements of the Jencks Act, 18 U.S.C. 3500. Subsequently the military court issued a subpoena to the Clerk of the House of Representatives. The Speaker laid this before the House on November 17, 1970, 116 Cong. Rec. 37652 [1970] but to date the House has taken no action nor given any indication that it will supply the information sought.

On October 4, 1972, the United States Senate bluntly refused, via Senate Resolution, a judicial subpoena for *inter alia*, documentary evidence in the criminal case of *United States* v. *Brewster*, then pending in the federal district court, District of Columbia. 118 Cong. Rec. S. 16, 766 (92d Cong., 2d Sess.).

speaking through Senator Stennis, relied on the privilege of confidentiality Congress enjoys in upholding the President's claim of privilege:

> We now come face to face and are in direct conflicts with the established doctrine of separation of powers * * *.
> I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files—and I do not think either one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field. (Committee on Armed Services, U.S. Senate, *Military Cold War Escalation* and *Speech Review Policies,* 87th Congress, 2d Sess., 512 [1962].).

On June 12, 1974, the United States Senate emphatically reiterated its position on privilege by deed, as well as by word. Senator Eastland, Chairman of the Judiciary Committee, urged, at the request of the Special Prosecutor, passage of a resolution permitting a staff attorney to file a trial affidavit with the Special Prosecutor. Without objection, S. Res. 338 was passed. It reads in part:

> *Resolved,* That by the privilege of the Senate of the United States no evidence under the control and in the possession of the Senate of the United States can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession, but by its permission.
> * * * (Sections 2–4) * * *

> SEC. 5. The said Peter Stockett, Junior, may provide information with respect to any other matter material and relevant for the purposes of identification of any document or documents in such case, if any such document has previously been made available to the public, but he shall respectfully decline to provide information concerning any and all other matters that may be based on knowledge acquired by him in his official capacity either by reason of documents and papers appearing in the files of the Senate or by virtue of conversations or communications with any person or persons.

The considerations of public policy that required the deliberations of the Constitutional Convention be held in confidence for half a century [50] and made it imperative that judges and members of Congress be permitted to work under conditions of absolute confidentiality are particularly compelling when applied

[50] The Framers understood perfectly well that enlightened decision-making requires the kind of frank and free discussion that can only be had when confidentiality is absolutely assured. On May 29, 1787, one of the first acts of the Constitutional Convention was the adoption of the following rule: "That nothing spoken in the House be printed, or otherwise published, or communicated without leave." 1 *Farrand* XV. It was not until 1819, that the Journal of the Convention, a mere skeleton of motions and votes, was made public. The fullest record of the proceedings of the Convention is in Madison's *Notes*. As late as 1831, 44 years after the Convention, Madison thought it was not yet appropriate for those *Notes* to be made public, 3 *Farrand* 497, and they were not published until 1840, four years after his death. 1 *Farrand* xv. President Madison thus anticipated the view of the most distinguished modern student of the Constitution, Paul Freund, who has said: "I sometimes wonder irreverently whether we would have had a Constitution at all if the Convention had been reported by daily columnists." Hughes, *The Living Presidency* 33n. (1973).

to presidential communications with his advisers. As stated by the President on July 6, 1973, in his letter to Senator Sam J. Ervin:

> No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential.

This has been the position of every President in our history, and it has been specifically stated by President Nixon's immediate predecessors.

Writing his memoirs in 1955, President Truman explained that he had found it necessary to omit certain material, and said: "Some of this material cannot be made available for many years, perhaps for many generations." 1 Truman, *Memoirs* x (1955). President Eisenhower stated the point with force on July 6, 1955, in connection with the Dixon-Yates controversy:

> But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, and if they are, will wreck the Government. There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an

> agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis. *Public Papers of Presidents of the United States: Dwight D. Eisenhower* 1955 at 674 (1959).

Congress recognized the high degree of confidentiality that must attach to presidential papers for many years when it enacted the Presidential Libraries Act of 1955, Pub. L. 84–373, 69 Stat. 695 (1955), now codified in 44 U.S.C. 2107, 2108. That statute encourages Presidents to give their papers to a presidential library, and provides that papers, documents, and other historical materials so given "are subject to restrictions as to their availability and use stated in writing by the donors or depositors * * * The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf." 44 U.S.C. 2108(c); *Nichols* v. *United States,* 460 F. 2d 671 (10th Cir.), *cert. denied,* 409 U.S. 966 (1972.) Since that Act was passed, the gifts of presidential papers of President Eisenhower, Kennedy, and Johnson have all specified that "materials containing statements made by or to" the President are to be kept "in confidence" and are to be held under seal and not revealed to anyone except the donors or archival personnel until "the passage of time or other circumstances no longer require such materials being kept under restriction." See letter of April 13, 1960, from

President Dwight D. Eisenhower to the Administrator of General Services; Agreement of February 25, 1965, between Mrs. Jacqueline B. Kennedy and the United States and Letter of August 13, 1965, from President Lyndon B. Johnson to the Administrator of General Services. In addition, the letters from President Eisenhower and from President Johnson specifically prohibit disclosure to "public officials" and state, as the reason for these restrictions, that "the President of the United States is the recipient of many confidences from others, and * * * the inviolability of such confidence is esential to the functioning of the constitutional office of the Presidency * * *."

The need to preserve the confidentiality of the Oval Office has been recognized from without as well as by those who have borne the burdens of service there. What Justice Stewart, who was joined by Justice White, said in his concurring opinion in *New York Times Co.* v. *United States,* 403 U.S. 713, 728 (1971), has particular force here:

> And within our own executive departements, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. * * *
>
> [I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality

necessary to carry out its responsibilities in the fields of international relations and national defense. (403 U.S. at 728–730).

Of course, international relations and national defense have very special claims to secrecy, but the importance of the President being able to speak with his advisers "freely, frankly, and in confidence" is not confined to those matters. It is just as essential that the President be able to talk openly with his advisers about domestic issues as about military or foreign affairs. The wisdom that free discussion provides is as vital in fighting inflation, choosing Supreme Court Justices, deciding whether to veto a large spending bill, and dealing with the myriad other important questions that the President must confront in his roles as Chief of State and Chief Executive, as it is when he is acting as Chief Diplomat or as Commander-in-Chief. Any other view would fragment the executive power vested in him and would assume that some of his constitutional responsibilities are more important than others. It is true that the President has more substantive freedom to act in foreign and military affairs than he does in domestic affairs, but his need for candid advice is no different in the one situation than in the other.

We submit, with all respect, that if the decision below were allowed to stand it could no longer fairly be contended that the President of the United States is "master in his own house." The confidences of that house would be open for disclosure to the Special Prosecutor—and thus ultimately to defendants—whenever one of 400 district judges chose not to accept the

President's claim of privilege.[51] Judge MacKinnon, in his dissent, in *Nixon* v. *Sirica*, 487 F. 2d 700, 752 (D.C. Cir. 1973), laid his finger on the pulse:

> But the greatest vice of the decision sought by the Special Prosecutor is that it would establish a precedent that would subject every presidential conference to the hazard of eventually being publicly exposed at the behest of some trial judge trying a civil or criminal case. It is this precedential effect which transforms this case from one solely related to the recordings sought here, to one which decides whether this President, and all future President, shall continue to enjoy the independency of executive action contemplated by the Constitution and fully exercised by all their predecessors.

[51] In *Nixon* v. *Sirica*, 487 F. 2d 700 (D.C. Cir. 1973), the court emphatically stated, at 705: "The strength and particularity of this showing were made possible by a unique intermeshing of events, unlikely soon, *if ever*, to recur." It said at 722: "We end, as we began by emphasizing the extraordinary nature of this case. We have attempted to decide no more than the problem before us—a problem that takes its unique shape from a grand jury's compelling showing of need." Since that decision, the President has received more than two dozen subpoenas emanating from various courts throughout the country, calling for the production of voluminous amounts of privileged materials. Indeed, the crippling effect on the Executive Branch, generated by that decision, was correctly predicted by Judge MacKinnon in his dissent. Thus, the impairment of the Executive function is no longer just an unverified, theoretical proposition. A further denial of the President's claim of privilege, as asserted, can only foreshadow further destruction to the Office of the Presidency. As Justice Rehnquist recognized in *State of Michigan* v. *Tucker*, No. 73-482 (June 10, 1974): "The pressure of law enforcement and the vagaries of human nature would make such an expectation [no errors by policeman in investigating serious crimes] unrealistic."

B. THE RIGHT OF PRIVACY AND FREEDOM OF EXPRESSION SUPPORT THE ABSOLUTE CONFIDENTIALITY OF PRESIDENTIAL COMMUNICATIONS WITH HIS ADVISERS

The President's sole discretion to decide what presidential communications he will disclose, and to control the circumstances of disclosure, is independently grounded in the right of privacy [52] and the constitutionally protected freedom of expression [53] possessed by the President, his advisers and others with whom he confers in the course of carrying out his official responsibilities. The relationship among these "rights" was summarized by Judge Wilkey, dissenting in *Nixon* v. *Sirica*, 487 F. 2d 700, 767 (D.C. Cir. 1973):

> Certainly the Chief Executive's right to be fully, frankly, and confidentially informed is equal to that of any other citizen in the land; his need is undeniably greater. To breach his privacy would unquestionably have a 'chilling effect' on those who otherwise would counsel and confide in the President with complete candor and honesty.

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[52] See *Griswold* v. *Connecticut*, 381 U.S. 479, 483–484 (1965), wherein Justice Douglas etched these words:

> In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion.
> * * * * *
> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

[53] Article II, section 2, clause 1, of the Constitution, states, in part:

> [H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) this Court acknowledged the broad scope of the First Amendment rights when it held immune from Sherman Act prosecution the attempts of railroads to influence legislation, the enforcement of laws, and the exercise of the veto power by the Governor of Pennsylvania, even though the railroads' efforts had been conducted fraudulently, unethically, and with an intent to injure or destroy competitors. This Court's interpretation of the Act was influenced heavily by the realistic assessment that the effective functioning of representative government depends on the most generous support for First Amendment values. Justice Black, for a unanimous Court, stated that application of the Sherman Act to the conduct in question—

> would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. (365 U.S. at 137).

The Court, therefore, refused to find that

> the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes * * *. (365 U.S. at 137).

In *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958), this Court quashed Alabama's discovery attempt to obtain N.A.A.C.P.'s membership lists,[54] thus preserving the organization from the "chilling effect" that disclosure would have wrought. The court emphasized:

> that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have. (357 U.S. at 466).

See also *Dombrowski* v. *Pfister*, 380 U.S. 479, 488–489 (1965).

As illustrated by the *Noerr* and *N.A.A.C.P.* cases, the problem of protecting political communications and the right of petition is a recurring issue involving a wide variety of factual settings. The ramifications for the effective functioning of the Presidency are of course virtually endless. Congressmen or their staff members must be able to give the President candid assessments of the political situation in the country, including the likely reactions of the House of Rep-

[54] Alabama's objective was to ensure compliance by the N.A.A.C.P. with the state's corporate registration laws, an objective uncontested by the N.A.A.C.P. The N.A.A.C.P.'s objection was to the *means* to obtain the end.

resentatives and the Senate to legislative proposals and to suggested presidential action. A legislator may wish to urge a course of action as wise, while warning that in a legislative battle he could not be counted on because of pressure from his constituents. Private persons and groups, too, may come to present points of view, offer support, warn of political retaliation, or suggest trade-offs. Contemporaneous memoranda prepared by or for the President and designed to preserve the details of such meetings are a vital part of the working and historical record. Knowledge that such records might be made public, under compulsion, in a future litigation would not only inhibit the expression of opinion but would dry up sources of indispensable information. The President would be denied the raw materials he needs to function effectively and responsibly.

The other side of this coin is that unless a President has the power to protect records of his private conversations from public disclosure, he himself would be seriously fettered. He would be less likely to seek out a broad range of advice and advisors; he would be constrained in his discourse or disabled from maintaining a record of his actions and conversations. Instead of concerning himself solely with shaping policy, a President would be driven to striking poses for the record, for history, or for his own personal protection.

C. THE JUDICIAL BRANCH CANNOT COMPEL PRODUCTION OF PRIVILEGED MATERIAL FROM THE PRESIDENT

The doctrine of the separation of powers embodies the concept that each branch is independent of the others, except where some form of interaction flows

from the regular operation of the government or where the Constitution or statutes explicitly provide to the contrary. The doctrine necessarily includes the right of the holder of the privilege to decide when it is to be exercised. It means, in this case, that compulsory process cannot issue against the President.

Chief Justice Taft in *Myers* v. *United States,* 272 U.S. 106, 116 (1926), provided the classic judicial statement of one separation of powers doctrine:

> Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people had [the Framers'] full approval. Madison in the Convention, 2 Farrand, Records of the Federal Convention, 56 *Kendall* v. *United States,* 12 Pet. 524, 610, 9 L. ed. 1181, 1215. Accordingly the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this court in *Meriwether* v. *Garrett,* 102 U.S. 472, 515, 26 L. ed. 197, 205; *Kilbourn* v. *Thompson,* 103 U.S. 168, 190, 26 L. ed. 377, 386; *Mugler* v. *Kansas,* 123 U.S. 623, 662, 8 S. Ct. 273, 31 L. ed. 205, 210.

Although the specific holding of the *Myers* case was narrowed to some extent in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), that narrowing was on a point that does not bear on the present issue. The later case was at pains to reaffirm the vigor with which the constitutional separation of powers must be protected and preserved. Justice Sutherland, writing for a unanimous Court, said:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the power of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. (295 U.S. at 629–630).

The President's assertion of his privilege as a functioning of his role as the head of an independent branch of government is supported by the basic case law. In *Marbury* v. *Madison, 1 Cranch* (5 U.S.) 137 (1803), William Marbury, a Federalist and recipient of a "lame duck" judicial appointment, i.e., justice of the peace, from President John Adams in the post-election days of 1800, sought, in early 1801, to secure from James Madison, the new Secretary of State under President Jefferson, the actual commission of his appointment. When Madison declined, Marbury

sought mandamus relief in the Supreme Court pursuant to Section 13 of the Judiciary Act of 1789. On February 24, 1803, after a fourteen month "recess," Chief Justice John Marshall, a fellow Federalist, denied all relief, holding that although only a ministerial duty on Madison's part was involved, the statute bestowing the judicial power on the Supreme Court in such a case was unconstitutional.[55] In the course of ascertaining whether the particular factual situation excluded Marbury from obtaining legal redress, the Chief Justice examined the relationship between the official position of the defendant and the nature of his act. Significantly, he stated:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use to his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> In such cases their acts are his acts; and *whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power*

[55] M. R. Cohen, *The Supreme Court in United States History*, 178–180 (1946) states that Marshall's decision was motivated by fear of impeachment from the newly-elected Republican Congress. Charles Warren, *The Supreme Court in United States History* 206–265 (1922), indicates the Republicans had been incensed at Adams' post-election appointments. This controversy eventually led to the fourteen month involuntary recess of the Court.

> *to control that discretion.* The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, *the decision of the executive is conclusive.* 1 Cranch (5 U.S.) at 165 (emphasis added).

The exchange between the Chief Justice and Mr. Lincoln, the Attorney General, during the hearing of the case foreshadowed his decision:

> The questions being written, were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.
>
> 1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and, 2d. He ought not be compelled to answer any thing which might tend to criminate himself.
>
> Mr. Lincoln thought it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.
>
> The court said that if Mr. Lincoln wishes time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. *There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it;* nor

> was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. 1 Cranch (5 U.S.) at 143–145. (emphasis added.)

Four years later, the *Burr* cases [56] came before Chief Justice Marshall. Three subpoenaes *duces tecum, in toto,* were sought and issued during the course of the intensely-contested trials, although only two were directed to President Jefferson. The first was requested on June 11, 1807, by Colonel Burr to obtain an October 21, 1806, letter from Colonel Wilkinson to the President, and two military orders, thought to be exculpatory on charges raised by a possible treason indictment. Following more than two days of argument on whether the Court had the right, under the circumstances of the case, to issue a subpoena against President Jefferson, the Chief Justice found that it ought to issue. The Court confined its inquiry to the narrow question of whether a subpoena should issue, and not to whether the court could or would compel actual compliance.[57] The Chief Justice said:

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[56] *United States* v. *Burr*, 25 Fed. Cas. 30, No. 14692d (C.C.D. Va. 1807); *United States* v. *Burr*, 25 Fed. Cas. 187, No. 14694 (C.C.D. Va. 1807).

[56] The cautious reference to the *Burr* ruling in *Branzburg* v. *Hayes*, 408 U.S. 665, 689 n. 26 (1972), goes no further than to note that Chief Justice Marshall had "opined" that a subpoena might issue. In *Branzburg*, itself, this Court recognized that ordinarily a grand jury has the right to every man's evidence, but immediately qualified that statement by adding "except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).

> If then, as is admitted by the counsel for the United States, a subpoena may issue to the President the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard, furnished to this high officer, to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstances which is to precede their being issued. (25 Fed. Cas. at 34).

As best as can be determined from an ambiguous history, President Jefferson never complied with that subpoena. President Jefferson did transmit to the United States Attorney, George Hay, certain records from the offices of the Secretaries of the Army and Navy that were covered by the subpoena. This was done, however in apparent ignorance of the fact that the subpoena had issued because his transmittal letter contains a well-stated argument why a subpoena should not issue, 9 Ford, *Writings of Jefferson* 56–57 (1899). President Jefferson did not transmit the described letter from General Wilkinson, although that document was specifically designated by the subpoena. It appears Burr was forced to trial for treason without the benefit of the letter, for on the convening of his subsequent trial for misdemeanor on September 3, 1807, he again demanded that letter, and another.

If President Jefferson did fully comply with that first subpoena, this is unknown to Marshall's biog-

rapher. See 3 Beveridge, *The Life of John Marshall* 518–522 (1919). The letters called for were not produced and Colonel Burr asserted that the President was in contempt of court, since a subpoena was outstanding. Jefferson was nervous about what Chief Justice Marshall might do, and threatened to use force against the execution of the process of the court. A subpoena *duces tecum* then issued against Hay, who had one of the letters Colonel Burr was seeking. Hay produced a part of the letter but refused to give passages that the President deemed confidential. After Mr. Hay made his return, unsatisfactory to Mr. Burr, Chief Justice Marshall, noting that the President had not personally assigned any reasons for nonproduction of the item sought, cautiously opined that the President could not lawfully delegate to his attorney presidential discretion concerning what matters required continued secrecy and ordered that the letter be produced.[58] Five days later, President Jefferson

[58] One writer has asserted that "in fact [Jefferson] *fully complied* with the subpoena." Berger, *Executive Privilege* v. *Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043, 1107 (1965) (emphasis in original). The author's footnote at that point, however, fails to support the statement in the text. Indeed, that same writer has retreated, since then, from his earlier categorical position. He now says: "In fact Jefferson went a *long way* toward full compliance." R. Berger, *Executive Privilege: A Constitutional Myth* 188 (1974). See 60 A.B.A.J., Irwin Rhodes, *What Really Happened to the Jefferson Subpoenas* 52 (January, 1974) for an additional, contemporary analysis of the *Burr* cases, which concludes: "It is eminently clear that President Jefferson never submitted the contents of the withheld material to the Court or Burr and that his claim to an exclusive exercise of executive privilege, unreviewed by the courts, was upheld by Chief Justice Marshall." (At 54).

responded with his certificate and the letter, "excepting such parts as he deemed he ought not to permit to be made public." *United States* v. *Burr*, 25 F. Cas. 187, 193 No. 14,694 (C.C.D. Va. 1807). As Beveridge relates it:

> A second subpoena *duces tecum* seems to have been issued against Jefferson, and he defiantly refused to "sanction a proceeding so preposterous," by "any notice" of it. And there this heated and dangerous controversy appears to have ended. *Id.* at 522.

At this point, Beveridge adds in a footnote:

> For some reason the matter was not again pressed. Perhaps the favorable progress of the case relieved Burr's anxiety. It is possible that the "truce" so earnestly desired by Jefferson was arranged. *Id.* at 522 n. 4.

Other historians have read the evidence the same way. Rossiter expresses doubt whether Jefferson was a great President but thinks that one act that remains "to his lasting credit" was his "first declaration of presidential independence in his rejection of Marshall's subpoena in the Burr trial." Rossiter, *The American Presidency* 70 (1956). At another point Rossiter says:

> Jefferson's rejection of Marshall's subpoena *duces tecum* in the Burr trial and Chase's opinion in *Mississippi* v. *Johnson* (1867), which spared Andrew Johnson the necessity of answering a writ of injunction, make clear that the judiciary has no power to enjoin or mandamus or even question the President. *Id.* at 39.[59]

[59] Actually, in *United States* v. *Cooper*, 25 Fed. Cas. 631, 633, No. 14,865 (C.C. Pa. 1800), Justice Chase, sitting as a Circuit

The Court in *Mississippi* v. *Johnson* refuted the state's request to enjoin President Johnson from enforcing two Reconstruction Act statutes because "the duty thus imposed on the President (to see that the laws are faithfully executed) is in no sense ministerial. It is purely executive and political." [60] 4 Wall. (7 U.S.) at 499. The Court noted that the "fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained," 4 Wall. at 500, and summarized the thrust of the case in these terms:

> It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.
>
> * * * * *
>
> The Congress is the Legislative Department of the government, the President is the Execu-

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Justice, refused to direct a subpoena to President Adams stating that "it was a very improper and very indecent request." Cooper, *Account of the Trial of Thomas Cooper* 10 (1800).

[60] See *Kendall* v. *United States* ex rel *Stokes*, 12 Pet. (37 U.S.) 524, 609 (1838), and *Nat'l. Treasury Employees Union* v. *Nixon*, 492 F. 2d 587 (D.C. Cir. 1974), for cases where purely ministerial duties were involved. While the courts are unable to compel a President to act or restrain him from acting, his act, when performed, is in proper cases subject to judicial review and disallowance. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

> tive Department. Neither can be restrained in its action by the Judicial Department; though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences. 4 Wall. at 499–500).

Without exception, the basic precedents support our contention that it is for the President to decide whether to disclose confidential presidential communications, and that his discretion is not subject to judicial review. Otherwise, the "essential co-equality" of the three branches, as the Court described it in *Humphrey's Executor* v. *United States,* 295 U.S. 602, 630 (1935), would be ended, and we would have taken a long—and probably irreversible—step toward government by Judiciary. Today it would be the Presidency that would be lessened and crippled in its ability to function. Tomorrow it could be Congress, for if presidential privacy must yield to a judicial determination, it is difficult to think of any ground on which congressional privacy could continue to stand.[61]

D. AN ALLEGATION OF CRIMINAL ACTIVITY DOES NOT OVERCOME THE ASSERTION OF PRESIDENTIAL PRIVILEGE

Even if the Special Prosecutor were able to make an evidentiary showing that the requested conversations were in furtherance of an alleged criminal conspiracy,

[61] Some measure of congressional privacy would remain under the Speech or Debate Clause of Article I, Sec. 6, but it is clear that Congress has long claimed a right of privacy, based on separation of powers, that goes far beyond what is protected by the Speech or Debate Clause.

such a showing could not overcome a presidential assertion of executive privilege. Executive privilege, unlike the attorney-client privilege, the husband-wife privilege, and other personal and evidentiary privileges, is a constitutional privilege which runs to the benefit of the public, rather than to the benefit of a particular individual. *Kaiser Aluminum and Chemical Corp.* v. *United States,* 157 F. Supp. 939, 944 (Ct. Cl. 1958). Current case law supports the view that proof of criminality will allow the defeat of an assertion of individual privilege. *United States* v. *Aldridge,* 484 F. 2d 655, 658 (7th Cir. 1973).[62]

The issue of whether this Court should allow an allegation of criminality to defeat a presidential assertion of privilege should be reached only after thorough and careful consideration of the applicable constitutional principles. The separation of powers doctrine is obviously vital to this determination, since this Court's consideration of the issue must necessarily include the broadest logical extensions that could result from denying the validity of the privilege. The Special Prosecutor argued successfully to the district court

[62] It is interesting to note in *Aldridge* that the individual privilege was held to fail only after the government, by producing evidence *at trial*, has established a *prima facie* case that the defendants had been involved in both securities and mail-fraud. 484 F. 2d at 658. It would be incongruous to allow a pre-trial showing of a grand jury's determination developed in a non-adversary forum, namely, that the President had an undefined role in a conspiracy, to overcome a constitutional privilege vital to the separation of powers doctrine. To do so would give the individual privilege a preferred classification over a constitutional privilege.

that the public interest to be served by disclosure of presidential conversations is the interest in seeing that "a trial is based upon all relevant and material evidence relating to the charges." (Memorandum of the Special Prosecutor, May 10, 1974, at p. 24). This finite interest in one criminal case must be weighed against the public interest in preserving the Presidency as a co-equal branch of government. The district court's construction of the executive privilege should not be allowed to stand merely to satisfy the desire to insure that "a criminal trial [is] based upon *all* relevant and material evidence relating to the charges." (Memorandum of the Special Prosecutor, May 10, 1974, at 24.)

Executive privilege, inherent in the separation of powers doctrine, extends to an entire branch of government. It is not an individual privilege. The right of confidentiality of executive communications is not a right established for the personal benefit of any one President. Consequently, even an abuse of that right by a President should not affect the validity or vitality of the privilege. If a President abuses the privileges and powers of his office, the proper remedy is not to reduce the office, but to deal with the offense, and to do so in accordance with the Constitution, *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, (1803); *Kendall* v. *United States* ex rel. *Stokes,* 12 Peters (37 U.S.) 524, 609 (1838).

The Framers of the Constitution were aware of the potential abuse by a President of a right or privilege accorded to his office. Nevertheless, it was made clear

that the privilege was not affected. Only two days before the adoption of the Constitution, the question of presidential abuse of power or personal involvement in criminal actions was discussed. To protect against a President who had committed treason from being able to pardon co-offenders, Gouvenor Randolph made a motion to except cases of treason from the presidential pardon power.[63] He argued that:

> The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traitors may be his own instruments. (2 *Farrand* 626–627).

In opposing the motion, James Wilson stressed the impropriety of limiting the applicability of a privilege accorded to the executive office because of the potential for abuse by an individual holding that office for a term. Should the officeholder be involved in the conspiracy, he argued, procedures were available in the Constitution other than the limitations or destruction of the privilege, that would deal with such abuse.

The Framers' rationale for not limiting the privileges and powers vested in the Presidency is equally applicable here. The right of confidentiality of the executive office, which has been recognized for the past 187 years, cannot be diminished, disregarded, or destroyed by the alleged criminal activities of the officeholder. Should any incumbent abuse the office,

[63] Describing the President's power to grant pardons, the United States Constitution, Art. II, section 2, clause 1, provides: ". . . he shall have the power to Grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."

the sole remedy is impeachment, not judicial limitations or exceptions to the privileges or rights vested in the Presidency itself. *Mississippi* v. *Johnson,* 4 Wall (71 U.S.) 475 (1867); *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137 (1803); *Ex Parte Grossman,* 267 U.S. 87, 121 (1925). An allegation of criminal involvement on the part of a President, therefore, does not affect the right of confidentiality which inheres in his office.

V. THE SPECIAL PROSECUTOR HAS FAILED TO DEMONSTRATE A UNIQUE AND COMPELLING NEED REQUIRED UNDER NIXON V. SIRICA TO OVERCOME A VALID CLIAM OF PRESIDENTIAL PRIVILEGE

As we have shown above, the assertion of privilege by a President is necessarily absolute and unreviewable. However, under different factual circumstances, in *Nixon* v. *Sirica,* 487 F. 2d 700 (D.C. Cir. 1973), the United States Court of Appeals for the District of Columbia Circuit held, that presidential conversations are "presumptively privileged," 487 F. 2d at 717, and may be overcome only by a "uniquely powerful showing," 487 F. 2d at 717, that the material subpoenaed was "critical," 487 F. 2d at 706, and contain[ed] evidence peculiarly necessary . . . for which no effective substitute is available. 487 F. 2d at 717.

A. PRIVILEGE GENERALLY

Thus, even if an evidentiary showing as required by Rule 17(c) had been made as to each of the requested items, the Special Prosecutor must demonstrate a unique and compelling need to overcome the privileged

nature of the materials. He has not done so, nor is he able to do so in this case. Although a party seeking production of material pursuant to Rule 17(c) may establish that the requested items are both relevant and evidentiary, a subpoena will not issue if the requested material is subject to a valid claim of privilege. In *Mackey* v. *United States,* 351 F. 2d 794, 795 (D.C. Cir. 1965), the court of appeals acknowledged the defense of "privilege" and held that "the government may be required to produce documents in its possession unless it makes a valid claim of privilege." Courts have long recognized that the public interest in maintaining state secrets of a diplomatic or military nature will override the interests in continuing litigation. See e.g. *Totten* v. *United States,* 92 U.S. 105, 107 (1875); *United States* v. *Reynolds* 345 U.S. 1, 11 (1953). The Judiciary has also responded to executive pleas to protect "intra-governmental documents reflecting * * * deliberations comprising part of a process by which governmental decision and policies are formulated." *Cary Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd on the opinion below, 128 U.S. App. D.C. 10, 384, F.2d 979, *cert. denied* 389 U.S. 952 (1967); *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 946 (Ct. Cl. 1958).

Similarly, in *Continental Oil Co.* v. *United States,* 330 F. 2d 347 (9th Cir. 1964), the existence of a valid claim of attorney-client privilege as to the various documents requested by a grand jury was sufficient alone to quash a subpoena *duces tecum.* See also

United States v. *White,* 322 U.S. 694, 699 (1944) (privilege against self-incrimination), *United States* v. *Jacobs,* 322 F. Supp. 1299 (C.D. Cal. 1971) (attorney-client privilege) and *United States* v. *Judson,* 322 F. 2d 460 (9th Cir. 1963) (privilege against self-incrimination). Moreover, if even a portion of a requested document is not subject to a valid claim of confidentiality, the privileged portions should nevertheless not be subject to disclosure by subpoena. Cf. *Magida* v. *Continental Can Co.,* 12 F.R.D. 74, 77 (S.D. N.Y. 1951).

B. APPLICABILITY OF EXECUTIVE PRIVILEGE

Under *Nixon* v. *Sirica,* 487 F. 2d 700 (D.C. Cir. 1973), the same rationale for individual privileges is equally applicable to a valid claim of executive privilege. The peculiar circumstances of the decision in *Nixon* v. *Sirica* should be outlined in order to better understand the scope of the court's treatment of executive privilege. In that case, the Special Prosecutor's showing in support of a grand jury subpoena was held to be sufficient to overcome the assertion of executive privilege. The court observed: "[t]he strength and particularity of this showing were made possible by a unique intermeshing of events unlikely soon, if ever, to recur." 487 F. 2d at 705. Based on sworn testimony before the Senate Committee investigating the Watergate incident and the testimony before the grand jury investigating the Watergate incident, the Special Prosecutor was able to demonstrate to the court's satisfaction that significant inconsistencies in the sworn testimony of presidential advisors relating to the con-

tent of conversations of these advisors raised a distinct possibility that perjury had been committed before the Senate Committee, and, perhaps, before the grand jury itself. 487 F. 2d at 705. This is the context in which *Nixon* v. *Sirica* must be read.

In that case, the court of appeals expressly "acknowledge[d] the longstanding judicial recognition of executive privilege," 487 F. 2d at 713, and agreed that the conversations involved were "presumptively privileged" 487 F. 2d at 717. The court noted that the presumption of privilege premised on the public interest in confidentiality may "fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." *Id.* at 713. Simple logic dictates, however, that if a presumption is not to be merely illusory, then a certain quantum of evidence is needed to overcome it. In this regard, the court stated that a claim of executive privilege is entitled to "great weight." 487 F. 2d at 715. Thus, the quantum of evidence to overcome the privilege must necessarily be even greater. It must at least be "uniquely powerful" since the court's holding in *Nixon* v. *Sirica* was premised on a "particularized showing of the grand jury's need for each of the several subpoenaed tapes," a need that both the District Court, 360 F. Supp. at 11 n. 7, and the majority of the court of appeals called "well documented and imposing." 487 F. 2d at 705.

It is important to recognize that the decision of the majority of the court of appeals in *Nixon* v. *Sirica* was based on the unique need of the grand jury, and not

that of a prosecutor in a post-indictment setting. Indeed, the special function of the grand jury was the predicate for the court's finding that the "presumption of privilege premised on the public interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." 487 F. 2d at 717. The court said:

> The function of the grand jury mandated by the Fifth Amendment for the institution of federal criminal prosecutions for capital or other serious crimes, is not only to indict persons when there is probable cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist. As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function—*evidence for which no effective substitute is available.* (487 F. 2d at 717) (emphasis added).

The court of appeals continually reaffirmed this limitation of its holding by speaking in terms of the grand jury's access and emphasizing that "we limit our decision strictly to that required by the precise and entirely unique circumstances of the case." 487 F. 2d at 704. See also 487 F. 2d at 722.

The fundamental distinction between a grand jury's need for evidence and that of a prosecutor in a post-indictment setting is significant here. The Special Prosecutor's position in requesting information for trial is not analogous to, and indeed is essentially different from, that of a grand jury seeking "evidence critical to [its] decision as to whether and whom to indict."

487 F. 2d at 706. By the very nature of the grand jury's function, the scope of its need for evidence is much broader than that of a prosecutor in a post-indictment setting. The standards of relevancy and materiality are thus necessarily much narrower in a trial setting than that of a grand jury investigation. This undisputed fact was recognized in *Schwimmer* v. *United States,* 332 F. 2d 855 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956) when the court stated. "[R]elevance and materiality necessarily are items of broader content in their use as to a grand jury investigation than in their use as to the evidence of a trial." 232 F. 2d at 862. The rationale for having this stricter standard at the trial stage was explained by the court *In Re Grand Jury Subpoena Duces Tecum,* 203 F. Supp. 575 (S.D.N.Y. 1961). "[B]ecause the grand jury may have to develop evidence for the first time, the requirements of relevance and materiality are certainly less strict on a grand jury investigation than at trial." 203 F. Supp. at 579. The district court in this case totally failed to address this distinction.

In *Nixon* v. *Sirica,* the Special Prosecutor was able to show that the nine tapes he requested "were each directly relevant to the grand jury's task" and they contained "evidence critical to the grand jury's decision as to whether and whom to indict," 487 F.2d at 706, "evidence for which no effective substitute is available." 487 F. 2d at 717. No such descriptions can be used to justify the Special Prosecutor's need in this case. There has been no allegation that the requested materials are essential or even necessary to

the trial. Nor has there been any attempt to demonstrate what relevant and admissible evidence is lacking that the subpoenaed material will fulfill. For all that is known, the material sought, to the extent that it may exist, may not contain any relevant evidence or the evidence it may contain may be wholly cumulative of matters than can be otherwise proved. In addition a large volume of evidence, both documentary and testimonial, is already available to the Special Prosecutor, including a very significant amount of material furnished him by the President.[64]

We submit that the public interest that would be served by disclosure in a post-indictment context is substantially less compelling than it is in a grand jury context, a rationale recognized by the court in *Schwimmer* v. *United States,* 232 F. 2d 855 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956). The presumption of privilege remains the same in both contexts. However, after a grand jury's finding of probable cause, the prosecutor's ability to make a showing of compelling need for the production of evidence is greatly enhanced because of evidence already available to him. Thus, in a post-indictment setting his burden of showing compelling need must necessarily be greater and factually more difficult, if it is to overcome the presumption of privilege. This conclusion is further enhanced by the fact that the Special Prosecutor signed the indictment returned by the grand jury in this case, which indeed could not have been returned

[64] Subsequent to the issuance of this subpoena, the President made available voluminous transcripts of numerous privileged conversations regarding Watergate-related matters to both the Special Prosecutor and the general public.

without his assent. *United States* v. *Cox,* 372 F. 2d 167 (5th Cir.), *cert. denied,* 381 U.S. 935 (1965). Therefore, the Special Prosecutor must have been satisfied that sufficient competent evidence of criminality was available to warrant the proceeding to trial against the persons indicted. The need for additional incriminating evidence, even if the items presently sought were in fact evidentiary, is bound to be cumulative or corroborative—certainly not a clear and compelling necessity.

C. BALANCING TEST

The court of appeals in *Nixon* v. *Sirica,* in deciding whether to quash a grand jury subpoena *duces tecum,* indicated that "the application of executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that could be served by disclosure in a particular case." 487 F. 2d at 716. The court also acknowledged, "[t]hat the President's special interests may warrant a careful judicial screening of subpoenas . . .," 487 F. 2d at 710, and if this "judicial screening" is to be meaningful, it must occur before a court engages in the balancing process. The court of appeals recognized this when it quoted with approval, the statement of Chief Justice Marshall in *United States* v. *Burr,* 25 F. Cas. 187, No. 14, 694 (C.C.D. Va. 1807):

> The President, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives *may be* such as to restrain the court from enforcing its production * * *. I can readily conceive that the

> President might receive a letter which it would be improper to exhibit in public * * *. The occasion for *demanding* it ought, in such a case, to be very strong and to be fully shown to the court before its production could be *insisted* on. 25 F. Cas. at 190–192. (emphasis in original) (487 F. 2d at 710).

Other cases also clearly demonstrate that in order for a court to balance countervailing public interest, the party seeking disclosure must make a threshold showing of compelling need or "uniquely powerful" need. In *United States* v. *Reynolds,* 345 U.S. 1 (1953), a case relied upon in *Nixon* v. *Sirica,* this Court stated:

> In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori,* where necessity is dubious, a formal claim of privilege . . . will have to prevail. (345 U.S. at 11).

At another point in *Reynolds* this Court stated:

> [W]e will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. *Id.*

This point is further illustrated by *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F. 2d 788, 792 (D.C. Cir. 1971). There the court held:

> Of course, the party seeking discovery must make a preliminary showing of necessity to warrant even *in camera* disclosure, . . .

Certainly, this well-documented principle supports the proposition that, before a court can even engage in balancing, the party seeking disclosure must show a compelling need to overcome a presumption of privilege. *Senate Select Committee on Presidential Campaign Activities* v. *Richard M. Nixon,* Slip Op. No. 74–1258 (D.C. Cir. May 23, 1974). Since that showing has not been made in this case, it was incumbent upon the district court to grant the President's motion to quash.

It is clear that the Special Prosecutor has failed to make the requisite showing of compelling need necessary to activate the balancing test. Nor has he made a sufficient showing to establish that each of the requested materials is relevant and admissible and that it is not an attempt to discover additional evidence already known. Therefore under well-established case law, the subpoena should have been quashed in all respects by the court below.

VI. AN INCUMBENT PRESIDENT CANNOT LAWFULLY BE CHARGED WITH A CRIME BY A GRAND JURY

A. THE PRESIDENT CANNOT BE INDICTED WHILE HE IS SERVING AS PRESIDENT

It has never been seriously disputed by legal scholars, jurists, or constitutional authorities that a President may not be indicted while he is an incumbent. The reasons for the President's non-indictability bear

directly on the question of whether he may be named as an unindicted co-conspirator by a grand jury. The reasons are obvious and compelling. They are particularly relevant in light of the ongoing proceedings in the House of Representatives.

The Presidency is the only branch of government that is vested exclusively in one person by the Constitution. Art. II, section 1, clause 1 states:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years
> * * *

Article II then details the powers and functions that the President shall personally have and perform. The functioning of the executive branch ultimately depends on the President's personal capacity: legal, mental and physical. If the President cannot function freely, there is a critical gap in the whole constitutional system established by the Framers.

The President, personally, as no other individual, is necessary to the proper maintenance of orderly government. Thus, in order to control the dangerous possibility of any incapacity affecting the President, and hence the executive branch, the Constitution specifically limits and provides for all those events that could incapacitate a President.[63]

The necessary reason for the great concern and specificity of the Constitution in providing for a President at all times capable of fulfilling his duties,

[63] U.S. Const., Amend. 25, ratified on February 23, 1967. See Congressional Research Service, United States Congress, *The Constitution of the United States* at 42–43.

is the fact that all three branches of government must have the capacity to function if the system is to work. While the capacity to function is assured to the legislative and judicial branches by the numbers of individuals who comprise them, the executive branch must depend on the personal capacity of a single individual, the President. Since the executive's responsibilities include the day-to-day administration of the government, including all emergency functions, his capacity to function at any hour is highly critical. Needless to say, if the President were indictable while in office, any prosecutor and grand jury would have within their power the ability to cripple an entire branch of the national government and hence the whole system.

Further analysis makes it even more clear that a President may not be indicted while in office. The President is vested under Art. II, section 3, clause 1, with the power "that the Laws be faithfully executed" and he has under Art. II, section 2, clause 1, the power of granting "Pardons for Offenses against the United States, except in Cases of Impeachment." Under that same clause, he shall appoint the "Judges of the Supreme Court" with "the Advice and Consent of the Senate." The President has also been granted by Congress the same power to appoint all Article III judges. 28 U.S.C. 44 and 28 U.S.C. 133. Since the President's powers include control over all federal prosecutions, it is hardly reasonable or sensible to consider the President subject to such prosecution. This is consistent with the concept of prosecutorial discre-

tion, the integrity of the criminal justice system or a rational administrative order. This is particularly true in light of the impeachment clause which makes a President amenable to post-impeachment indictment. Art. I, section 3, clause 7. This clause takes account of the fact that the President is not indictable and recognizes that impeachment and conviction must occur before the judicial process is applicable to the person holding office as President. This section reads: "But the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." While out of necessity an incumbent President must not be subject to indictment in order for our consitutional system to operate, he is not removed from the sanction of the law. He can be indicted after he leaves office at the end of his term or after being "convicted" by the Senate in an impeachment proceeding.

The history surrounding the Constitution's adoption further makes it clear that impeachment is the exclusive remedy for presidential criminal misconduct. A very revealing interchange took place on September 15, 1787, only two days before the final adoption of the Constitution. Gouverneur Randolph moved to except cases of treason from the power of the President to pardon offenses against the United States, a power granted by Art. II, section 2, clause 7.

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be

> liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

There are several relevant considerations that should be noted about the Convention and the provision that resulted from them. First, it is clear that an incumbent President is not subject to criminal prosecution. He is amenable to the criminal laws, but only after he has been impeached and convicted, and thus stripped of his critical constitutional functions.

The text of Art. I, section 3, clause 7, points so explicitly in that direction that it hardly requires exposition, and the legislative history is wholly in accord. James Wilson noted that if the President himself be a "party to the guilt he can be impeached and prosecuted." 2 *Farrand* 626. And on September 4, 1787, in the recurring debate on whether impeachments should be tried by the Senate or by the Supreme Court, Gouverneur Morris said:

> A conclusive reason for making the Senate instead of the Supreme Court the Judge of Impeachments, was that the latter was to try the President after the trial of the impeachment. 2 *Farrand* 500.

The decision to make the Senate, and not the Supreme Court,[66] the ultimate body to decide upon the Presi-

[66] In this respect Gouverneur Morris noted:

> [N]o other tribunal than the Senate could be trusted [to try the President]. The Supreme Court were too few in number and might be warped or corrupted. He was agst. [sic] a dependence of the Executive on the Legislature, considering the Legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate

dent's removal, further argues for limiting any court or grand jury from removing a President by way of indictment or other judicial process.

There is literally nothing in all of the records of the Convention to suggest that any delegate had any contrary view. This reading of the language in question was put forward twice by Hamilton when he wrote:

> The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. *The Federalist,* No. 65, at 426 (Modern Library ed. 1937).

He returns to the point in the 69th *Federalist,* and uses it there to illustrate an important distinction between a President and a king.

> The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the King of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution.

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would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out. *2 Farrand 551.*

So far as we are aware, that an incumbent President is not indictable is a proposition that has never been challenged by the Special Prosecutor. The proposition is relevant here because of the suggestion that an otherwise valid claim of privilege by the President should be overridden if there is in some manner an alleged showing of a *prima facie* criminal case or a *prima facie* finding of criminal involvement, such as the authorizing of the naming, or the naming of the President as an unindicted co-conspirator. If, however, such facts were true, which they are not, they go not to the evidentiary needs of the grand jury, but to those of the Committee on the Judiciary in the House.

Whatever the grand jury may claim about a President, its only possible proper recourse is to refer such facts, with the consent of the court, to the House and leave the conclusions of criminality to that body which is constitutionally empowered to make them. The grand jury may not indict the President or allege that there is probable cause to find criminal liability on the part of a President. Thus, such a claimed "finding" by the grand jury has no force in overcoming any presidential claim of privilege, as it is a legal nullity, being constitutionally impermissible.

A second important theme that runs through the debates of the Constitutional Convention of 1787 is whether the President should be answerable, in an impeachment proceeding, to the courts or to the Senate. On June 13, 1787, the Committee of the Whole adopted a resolution offered by Messrs. Randolph and Madison to give the national Judiciary jurisdic-

tion of "Impeachments of any national officers." 1 *Farrand* 224. On July 18th, however, the Convention voted unanimously to remove the language giving the courts jurisdiction of impeachments. 2 *Farrand* 39. This did not end the matter. The report of the Committee on Detail, on August 6th, would have given the Supreme Court original jurisdiction "in cases of impeachment." 2 *Farrand* 186. As noted above a subsequent committee, however, recommended on September 4th that the trial of impeachments be by the Senate, 2 *Farrand* 493. This was approved on September 8th by a vote of nine states to two. 2 *Farrand* 547. See the report of the debate on this issue at 2 *Farrand* 551–553.

The significance of the foregoing history is that it is not mere chance or inadvertence that the President is made answerable to the Senate, sitting as a Court of Impeachment. The Framers repeatedly considered making him answerable to the Judiciary, and they twice rejected proposals to this effect, thus further reinforcing the conclusion that it would be wholly inconsistent with the Framer's intent to hold a President indictable.

Finally, it should also be observed that there was no sentiment in the Convention for providing restraints other than impeachment against a President. The argument went quite the other way. There was sentiment in the Convention that a President would not be subject even to impeachment and that it would be enough that he served for a limited term and would answer to the people if he chose to stand for reelection. This point was extensively debated on July 20,

1787, with the motion to strike out the impeachment provision offered by Charles Pinckney and Gouverneur Morris, 2 *Farrand* 64–69. The arguments in favor of the Pinckney motion seem unpersuasive, and in fact during the course of the debate on it, Morris admitted that the discussion had changed his mind. But the debate is interesting because those who opposed the Pinckney motion, and supported retention of impeachment, made it clear that this was the only means by which they considered that the President was subject to law. Thus, Colonel George Mason said:

> No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors. (2 *Farrand* 65).

And again Eldridge Gerry—

> urged the necessity of impeachments. A good magistrate will not fear them. A bad one ought to be kept in fear of them. He hoped that maxim would never be adopted here that the Chief Magistrate could do no wrong. (2 *Farrand* 66).

By a vote of eight states to two, the Pinckney motion was defeated and the Convention agreed that the Executive should be removable on impeachment. 2 *Farrand* 69. But it is only conviction in the Senate that leads to this result. On September 14th, the Convention rejected, by a vote of eight states to three, a proposal that an officer impeached by the House be suspended from office until tried and acquitted by the Senate. 2 *Farrand* 612–613.

This examination of the proceedings of the Constitutional Convention of 1787 establishes that the Framers deliberately chose one particular means of guarding against the abuse of the powers they entrusted to a President. He may not be indicted unless and until he has been impeached and convicted by the Senate. Impeachment is the device that ensures that he is not above justice during the term in office, and the trial of impeachment is left to the Senate and not to the courts.

Those principles have been recognized by this Court. In the early and leading case of *Marbury* v. *Madison* 1 Cranch (5 U.S.) 137, 165 (1803), the Court said:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.

Thirty-five years later, in *Kendall* v. *United States ex. rel. Stokes,* 12 Pet. (37 U.S.) 524, 610 (1838) the Court said:

> The executive power is vested in a President and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power.[67]

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[67] See also the observations in 1 Bryce, *The American Commonwealth* 89 (1889):

> The President is personally responsible for his acts, not indeed to Congress, but to the people, by whom he is chosen. No means exist of enforcing this responsibility, except by impeachment, but as his power lasts for four years only, and is much restricted, this is no serious evil.

We are wholly mindful of weighty warnings against the view that "the great clauses of the Constitution must be confined to the interpretation which the Framers, with the conditions and outlook of their time, would have placed upon them. . . ." *Home Building & Loan Assn.* v. *Blaisdell.* 290 U.S. 398, 443 (1934). But if the provisions of the Constitution that we have been discussing can fairly be said to have taken on new meaning with the passage of years, and with the emergence of new problems, surely any change must be in the direction of strengthening the independence of the Presidency, rather than creating new hobbles on it.

Powell v. *McCormick,* 395 U.S. 486 (1969), reaffirms the extraordinary nature and strictly limited character of the power to remove political officials, particularly those directly elected by the people. That decision held that the Congress could not expand the constitutional limits mandated for expelling or alternatively excluding a Congressman from his seat. U.S. Const., Article I, section 5, clause 2; Article I, section 2, clause 2. The constitutional sanctity of the people's electoral choice, therefore, was considered so important that it required judicial intervention and protection. While judicial action was required in *Powell* to protect the electorate's rights under the Constitution, the reverse is certainly not true. This same power cannot be used to nullify the electorate's decision. This is particularly true in the case of the Presidency when the Constitution explicitly delegates the power to remove the President under strict conditions to the representatives of the voters who elected him. It seems improbable, at best, to suggest that the Framers

felt that any court and grand jury could also remove or even legally incapacitate the Chief Executive. The specificity and grave nature of the impeachment process and the total absence of any discussion of any other method, is an extremely powerful argument for the exclusivity of impeachment as the only method of removing a President.

The *Powell* case emphasizes that while another branch cannot control the Congress in the execution of their peculiar constitutional responsibilities, neither can the Congress, as a whole, control the execution of a particular Congressman's duties via exclusion. Exclusion is an action that the Congress may take solely within the limits of Article I, section 2, clause 2. It is not a political tool. Obviously this also applies to the executive branch. If Congressman Powell could not be excluded from his congressional seat by a majority of Congress except by adhering to the requirements of the Constitution, then surely the Chief Executive may not be deprived of his ability to control decisions in the executive branch by a member of the executive department, unless the President has specifically delegated this authority to him. Nor can such an employee control the President through judicial or criminal process.

The decision in *Powell* is also harmonious with the long established principle that the Judiciary may prevent other branches from overstepping their constitutional bounds of responsibility. ***Marbury* v. *Madison,*** 1 Cranch (5 U.S.) 137 (1803). In *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), this Court

made a similar determination that certain actions taken by the executive branch were beyond the scope of the constitutional duties mandated to the branch. If the Judiciary had determined that seizing the steel mills had been within the powers the Constitution and the laws had entrusted to the President, clearly it could not have forced the President to exercise his discretion and seize the mills. Although the Supreme Court has ruled innumerable laws unconstitutional over the last 187 years it has never once mandated that either Congress exercise its descretion to pass a law or the Executive prosecute an individual. The reasons are self-evident.

Today, in our nuclear age, far more than in George Washington's time, the nature of our country and of the world insistently requires a President who is free to act as the public interest requires, within the framework created by the Constitution. The whole Watergate problem has illustrated how truly complex the right decision can be. It is thus all the more necessary that a President have the ability to freely discuss issues, think out loud, play the devil's advocate, and consider alternatives, free from the threat that a probing statement will one day form the basis for an allegation of criminal liability.

B. THE GRAND JURY ACTION OF NAMING THE PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR IS A NULLITY

The constitutional policy that mandates that the President is not subject to judicial process or criminal indictment while President, clearly shows that the grand jury action naming or authorizing the name of

the President as an unindicted co-conspirator contravenes the constitutional power of the grand jury or any court of this country.

The implication by a grand jury on the basis of certain alleged facts, that the President may have violated the law can have only one proper result. As stated above, the grand jury may with the district court's consent, forward the factual material creating the implications, minus any conclusions, to the House of Representatives.[68] That result was fulfilled when the grand jury filed with the court below its factual report and recommended that it be forwarded to the House Judiciary Committee, in March of 1974. The President made no objection to this move because the House of Representatives is the proper body, the only proper body, to impeach a President, as part of the process of removing a President from office. The grand jury's constitutionally impermissible authorization to the Special Prosecutor, permitting the President to be named or naming the President as an unindicted co-conspirator, however, attempts to subvert and prejudice the legitimate constitutional procedure of impeachment.

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[68] This is the necessary implication of the grand jury's role, as a body with a limited mandate, as opposed to the House of Representatives whose political and constitutional mandate entitles them to consider whether in light of the President's complex responsibilities and political concerns a particular action or statement of his constitutes a crime. While any citizen may clearly express an opinion to his Congressman on the President's guilt, innocence or character, a grand jury, as an official part of our system of justice, with all that implies for its credibility and impact, may not.

In its opinion in *In Re Report and Recommendation of the June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219 (D.D.C. 1974), the district court convincingly demonstrated why the June 5, 1972, Grand Jury could not authorize the naming of the President as an unindicted co-conspirator. The very reasons why it was proper to refer the *Report and Recommendation to the House of Representatives* are those that argue against referring the naming or the authorization to name the President as an unindicted co-conspirator to that same body. In fact, these same considerations today require its expungement, because it is a legal nullity that continues to prejudice the President by its purported legal significance and apparent authority. The court below noted of the Report:

> The Report here at issue suffers from none of the objectionable qualities noted in *Hammond* and *United Electrical*. It draws no accusatory conclusions. It deprives no one of an official forum in which to respond. It is not a substitute for indictments where indictments might properly issue. *It contains no recommendations, advice or statements that infringe on the prerogatives of other branches of government.* Indeed, its only recommendation is to the Court, and rather than injuring separation of powers principles, the Jury sustains them by lending its aid to the House in the exercise of that body's constitutional jurisdiction. It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and

no more. (370 F. Supp at 1226) (emphasis added).

As noted by the district court nothing could be more important to America's future than that the ongoing impeachment be "unswervingly fair." 370 F. Supp at 1230. And nothing could be more clear than that the naming of the President of the United States as an unindicted co-conspirator by a secret grand jury proceeding, which was subsequently leaked to the press, is a direct and damaging assault on the fairness of the House impeachment proceeding. It is the kind of prejudice that a court would certainly be required to remedy or compensate for if it affected the rights of a criminal defendant to a trial, free from the probability of prejudicial pre-trial publicity. *In Re Murchison,* 349 U.S. 133 (1955); *Estes* v. *Texas,* 381 U.S. 532 (1965); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966).

This unauthorized action of the grand jury that has the appearance of official status, and presently the implicit approval of the lower court may well directly affect the outcome of the House procedure. Yet, the President has no legal recourse against the grand jury's action except with this Court. No petit jury, whose obligation is to find guilt "beyond a reasonable doubt" is empowered to adjudicate this charge against the President.[69]

The rigorous adversary format, with that most powerful tool for determining the truth, cross-examination, is not available in the secret grand jury

[69] While the President, as an individual, might some day vindicate himself before a petit jury, as long as he holds the office of President he could not be vindicated in a court of law.

setting. It is now well established that the right of cross-examination is an essential element of due process in any proceeding where an individual's "property" or "reputation" may be adversely affected.[10] The fundamental right to present evidence and to cross-examine witnesses in an impeachment proceeding is manifest. As the experience of our judicial system has demonstrated, the most effective method of establishing the truth of an accusation is to permit the respondent the right to personally cross-examine those presenting adverse testimony. The Supreme Court flatly states in *Greene* v. *McElroy*, 360 U.S. 474 (1959) that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-

[10] *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Bell* v. *Benson*, 402 U.S. 535 (1971); Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972) and *Wisconsin* v. *Constaintineau*, 400 U.S. 433, 437 (1971).

> examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . action was under scrutiny. (360 U.S. at 496–497).

Justice Douglas in the concurring opinion in *Peters* v. *Hobby*, 349 U.S. 331 (1955), emphasized the necessity of permitting a respondent to cross-examine all adverse witnesses.

> Under cross-examination [witnesses] stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.
>
> Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and outer darkness, without the rudiments of a fair trial. (349 U.S. at 351).

There is no way within our judicial system to disprove allegations made against a President. It is because of this and because of the vast impact of this purportedly official criminal implication and charge against a President, on the whole body politic, that the Constitution requires no less a body than the whole House of Representatives to find the President likely enough

to be guilty of criminal misconduct that he should be tried by the Senate.

The characterization of the President of the United States as an unindicted co-conspirator, is nothing less than an attempt to nullify the presumption of innocence by a secret, non-adversary proceeding. The presumption of innocence is a fundamental of American justice; the grand jury's procedure is an implication of guilt which corrupts this ideal. To thus allow the Special Prosecutor to use such a constitutionally impermissible device, as an incident to an evidentiary desire, for the purpose of overcoming executive privilege, is wholly intolerable. The American legal system has never allowed the desire for evidence to go beyond the bounds of law. *Boyd* v. *United States,* 116 U.S. 616 (1886); *Weeks* v. *United States,* 232 U.S. 383 (1914); *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385 (1920); *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The President should not be made a hostage of the unwarranted pressure inherent in the grand jury's improper action.

The former Special Prosecutor, Mr. Archibald Cox, was quoted in the *New York Times* on January 5, 1974, as dealing with this exact issue. In response to rumors that he would name the President as an unindicted co-conspirator the newspaper printed this:

> Mr. Cox, in the telephone interview from his vacation home in Maine, described such a technique as 'just a backhanded way of sticking the knife in.' *New York Times,* January 6, 1974, p. 1, col. 6; p. 40, col. 1.

A later issue of the *New York Times* dealt with the same basic questions when it stated:

> Leon Jaworski, the Watergate special prosecutor, advised the Federal Grand Jury investigating the Watergate break-in and cover-up that it would not be 'responsible conduct' to move to indict President Nixon, according to a spokesman for the office.
>
> Although Mr. Jaworski's advice to the Grand Jury did not refer to President Nixon by name—the matter was discussed in terms of a factual situation such as exists—it did include the suggestion that the House Judiciary Committee's impeachment inquiry was the proper forum to consider matters of evidence relating to a President.
>
> Although there had been speculation that Mr. Jaworski had tentatively concluded that legal complications militated against a move to indict the President, today's statement was the first direct confirmation of the fact. *New York Times*, March 12, 1974, p. 1.

It is only by impeachment and conviction and then subsequent criminal action that the President may be found to be a member of any criminal conspiracy. To base a desire for evidence on a stratagem which attempts to cripple the Presidency, and thus nullify the President's claim of executive privilege, is unprecedented, but more significantly a grotesque attempt to abuse the process of the judicial branch of government. Under our system of government only the House of Representatives may determine that evidence of sufficient quantity and quality exists to try the Pres-

ident. And, that trial must take place in the Senate with the Chief Justice presiding.

C. EVEN IF IT WERE PERMISSIBLE, THE NAMING OF AN INCUMBENT PRESIDENT AS AN UNINDICTED CO-CONSPIRATOR DOES NOT CONSTITUTE A PRIMA FACIE SHOWING OF CRIMINAL ACTIVITY

In the preceding section we have conclusively demonstrated why it is not constitutionally permissible to name an incumbent President as an unindicted co-conspirator. However, if such an act had been constitutionally permissible, it would nevertheless not have the effect of constituting a *prima facie* showing of criminality sufficient to overcome the President's constitutional claim of executive privilege.

There is a basic distinction between a finding of "probable cause" and the showing of a "*prima facie*" case which makes the Special Prosecutor's use of these two terms in the instant case both inaccurate and improper.

Probable cause is a legal concept based on the proposition that a crime "might" have been committed. As such it justifies an inquiry into an individual's guilt. It does not justify any legal effect that would operate to overcome either a presumption of innocence or executive privilege attaching to an otherwise valid claim. On the other hand, *prima facie* evidence is evidence sufficient to have a legal effect, which if unrebutted, is sufficient to go to a jury in a trial setting and sufficient to convict an individual of a crime before a petit jury. The finding of the grand jury at issue here has none of this sufficiency. It has never been tested in

any adversary forum and hence is insufficient to have any legal effect on the rights or privileges of anyone.

This elementary distinction was noted by the Court in *Locke* v. *United States,* 7 Cranch (11 U.S.) 339, 348 (1813):

> It is contended, that probable cause means *prima facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation.
>
> This argument has been very satisfactorily answered on the part of the United States by the observation that this would render the provision totally inoperative. It may be added, that the term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by Congress.

Nothing could make the legal objections to using a probable cause standard to overcome a valid claim of presidential privilege clearer, than this Court in *Brinegar* v. *United States,* 338 U.S. 160, 176 (1949), when it stated:

> The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

The claim that the grand jury's action is sufficient to constitute a *prima facie* showing of criminality can be seen for what it is: an attempt to use a practical tool of law enforcement as a constitutional bludgeon to batter down the President's rights to due process and his fundamental right to be presumed innocent by the law. Recently this basic point was reaffirmed by the Court in *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965), when in quoting *Brinegar,* this Court stated:

> There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them. (338 U.S. at 108).

The *prima facie* showing that the Special Prosecutor claims to have made can only have been made if the President of the United States is to be tried and convicted by a grand jury! Thus the Special Prosecution's argument is a legal absurdity.

An indictment may be returned against an accused upon a grand jury's finding that the "evidence" constituted the existence of probable cause to believe the accused participated in criminal activity. It must always be remembered that this "evidence" is not the type of evidence that in a trial court goes to the question of guilt or innocence. It is not evidence that has ever been tested in an adversary forum, in which an opportunity would have been presented to explore its alternative inferences, to question its credibility by

cross examination, and to offer evidence which may rebut the original allegation. All that the evidence weighed by a grand jury can ever be said to show fairly is that there is probable cause to believe someone should be brought to trial. In the instant case, the grand jury could only find "probable cause" of criminal activity on the part of the President and nothing more, if it could even find that. Yet the Special Prosecutor says this finding of probable cause is a *"prima facie"* showing of criminality. *Prima facie* evidence of a fact, however, is such evidence as will establish that fact in a court of law if not rebutted. *Lilienthal's Tobacco* v. *United States,* 97 U.S. 237, 268 (1877); *United States* v. *Wiggins,* 14 Pet. (39 U.S.) 334 (1840). It thus becomes obvious that in a grand jury setting, the kind of *prima facie* showing the Special Prosecutor talks about, cannot occur.

A grand jury finding of probable cause in most cases results in an indictment which is merely an accusation of criminal activity and is not evidence of criminality. In *United States* v. *Cummings,* 468 F. 2d 274, 278 (9th Cir. 1972), the Court of Appeals found serious error and reversed the judgment of the trial court because it allowed counsel for the government in closing argument to suggest that the return of an indictment by a grand jury was an indication of the guilt of the accused. In a criminal trial, the fact that a grand jury heard evidence and, based on that evidence, returned an indictment, does not allow inference of guilt. *United States* v. *Sutton,* 312 F. Supp. 969, 972 (D. Ariz. 1970), *aff'd* 446 F. 2d 916, 922 (9th

Cir. 1971), *cert. denied,* 404 U.S. 1025 (1972). In *Sutton,* the United States Attorney, in his summation, made reference to the fact that the proceeding was by indictment and that at least twelve people have to agree on the indictment after hearing evidence. This comment was objected to and the trial judge sustained the objection and, shortly thereafter, instructed the jury that the indictment is no evidence and it does not create any presumption or inference of guilt. 312 F. Supp. at 972. In this regard the court of appeals found that only the trial judge's timely actions prevented the United States Attorney's improper comment from prejudicing the appellant and eliminated any necessity for a mistrial. 446 F. 2d at 922. Likewise, only this Court's timely action in declaring the invalidity and improper character of the grand jury's action in this case will offset to some degree the prejudice to the President.

Jury instructions are frequently, if not always, used to inform a jury that an indictment is merely a formal method of accusing a defendant of a crime and is not evidence of any kind against the accused.[71] e.g. 1 Federal Jury Practice and Instructions, Devitt & Blackmar, § 11.02 at 208 (1970). Such instructions are universally accepted. See e.g., *Adjmi* v. *United States,* 343 F. 2d 164, 165 (5th Cir. 1965); *Black* v. *United States,* 309 F. 2d 331, 343 (8th Cir. 1962), *cert. denied,* 372 U.S. 934 (1963); *United States* v. *Senior,* 274 F. 2d 613, 617 (7th Cir. 1960). Therefore, since the grand

[71] A similar instruction is used when a charge is made by an information rather than an indictment.

jury's determination of probable cause is not evidence of guilt or criminality in a trial proceeding we submit that the court below was not and could not have been presented with a *prima facie* showing of criminality.

Moreover, in the instant case, even if the Special Prosecutor could, by some strange convolution of law and logic, make an evidentiary showing of criminality on the part of the President, it would still have been necessary for this "showing" to overcome three distinct presumptions in order to allow the trial court to rule properly that the conversations sought here are not privileged. These presumptions are (1) the presumed validity of a claim of executive privilege, (2) the presumption that every man is innocent until proven guilty, beyond a reasonable doubt, in a court of law, and (3) the presumption of regularity applied to the acts of a government official.

Besides the presumption of validity that is inherent in any presidential assertion of executive privilege, *Nixon* v. *Sirica,* 487 F. 2d 700, 715, 717 (D.C. Cir. 1973), there exists the presumption of innocence afforded to every man under the law. At the start of a trial, the law persumes an accused innocent with no evidence against him. *United States* v. *Agnew* 165 U.S. 36, 52, (1897); 9 *Wigmore On Evidence* § 2511 (3rd ed. 1940). The President, who is not even involved in a criminal proceeding, is certainly presumed innocent of criminal activity until a proper and sufficient evidentiary showing is made to demonstrate the contrary. Such a showing could only be made in an impeachment proceeding, followed by indictment, trial and convic-

tion in a court of law. In any event, a secret, non-adversary grand jury proceeding, leaked to the public, can hardly cast any legal stones at the President's presumption of innocence. In the instant case, the Special Prosecutor has not made any evidentiary showing of criminality.

The final presumption that must be overcome in order for a judicial determination to be made that the subpoenaed conversations deal with criminal conduct is the presumption of regularity. The law presumes that government officials perform the requirements of legal conditions incumbent to their office. 9 *Wigmore On Evidence,* § 2534 (3rd ed. 1940). The President operates under the constitutionally imposed duty to see "that the Laws be faithfully executed." U.S. Const., Art. II, sec. 3. The presumption of regularity applied to the acts of the President, in the instant case, would require a presumption that, when the President converses with his aides, his action is proper and pertains to the performance of official duties imposed by law. See *F.C.C.* v. *Schreiber,* 381 U.S. 279, 296 (1965). (Administrative agencies of the government are entitled to the presumption that they will act properly and according to law.) The nature and scope of the President's constitutional mandate dictate that the quantum of evidence necessary to overcome the presumption of regularity indeed be substantial. Any other result would severely limit the President's ability to fulfill his wide discretionary responsibilities under the Constitution. Thus, the presumptions of a valid claim of executive privilege, innocence, and the

regularity of governmental activities present formidable barriers which the Special Prosecutor has not overcome, and which he certainly cannot overcome behind the closed doors of a grand jury proceeding.

VII. THE SPECIAL PROSECUTOR FAILED TO SATISFY THE REQUIREMENTS FOR A RULE 17(C) SUBPOENA

A. THE SPECIAL PROSECUTOR HAS FAILED TO DEMONSTRATE THAT THE MATERIALS SOUGHT WERE RELEVANT AND EVIDENTIARY

Before a determination can be made that the President's assertion of executive privilege has been overcome, the Special Prosecutor has the burden of proving that his subpoena meets the stringent requirements of Rule 17(c), Federal Rules of Criminal Procedure. The court below in its May 20, 1974, opinion and order reached the conclusion that the requirements of Rule 17(c) were met. Specifically, the court stated:

> It is the Court's position that the Special Prosecutor's May 10, 1974, memorandum correctly applies the Rule 17(c) standards particularly in the more unusual situation of this kind where the subpoena, rather than being directed to the government by defendants, issues to what, as a practical matter, is a third party. (*United States* v. *Mitchell,* Cr. No. 74–110, (D.D.C. filed May 20, 1974) at 5).

This determination of the court below is a conclusion, unsupported by any reference either to the specific requirements of Rule 17(c) or to how the Special Prosecutor's showing has satisfied these requirements. The Court's conclusion is apparently based on the Spe-

cial Prosecutor's memorandum of May 10, 1974, and the court's finding that the President is a third party. The showing made in the memorandum of May 10, 1974 does not meet the strict requirements of Rule 17(c). Furthermore, the President is not to be judged as a typical third party in a judicial subpoena proceeding.

The Special Prosecutor sought this subpoena pursuant to Criminal Rule 17(c), which provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

The leading case discussing Rule 17(c) is *Bowman Dairy Co.* v. *United States,* 341 U.S. 214 (1951). In *Bowman,* this Court plainly emphasized that "Rule 17(c) was not intended to provide an additional means of discovery." 341 U.S. at 220. On the contrary, its application was specifically limited only to production of "evidentiary" material. 341 U.S. at 219. In this regard this court stated, "[I]n short, any document or other material admissible as evidence . . . is sub-

ject to subpoena." 341 U.S. at 221. By utilizing this admissible evidence standard in applying Rule 17(c), this Court rejected a conclusory request by the defendants for materials that "are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants . . ." 341 U.S. at 221, a request that is quite similar to the one sustained by the court below. This Court considered such a "catch-all" request as invalid for it was "not intended to produce evidentiary materials but [was] merely a fishing expedition to see what may turn up." 341 U.S. at 221.

That all subpoenaed materials under Rule 17(c) must be both evidentiary in nature and relevant is uniformly required by the courts, which have recognized that Rule 17(c) is subject to abuse by parties seeking additional pretrial discovery. Consequently, courts have developed criteria that the party seeking a pretrial subpoena must meet before compliance will be ordered. In *United States* v. *Iozia,* 13 F.R.D. 335 (S.D.N.Y. 1952), Judge Weinfeld formulated the following criteria, which have been frequently cited by other courts:

> (1) That the documents are evidentiary and relevant;
>
> (2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;
>
> (3) That the defendant cannot properly prepare for trial without such production, and inspection in advance of trial and failure to obtain such inspection may tend reasonably to delay the trial;

(4) That the application is made in good faith and is not intended as a general fishing expedition. 13 F.R.D. at 338.[72]

As to the burden of establishing the validity of a subpoena *duces tecum*, controlling case law recognizes that it is incumbent upon the party seeking disclosure to set forth each request with sufficient specificity to establish that each document is both "relevant" and "admissible," and that the other *Iozia* criteria have been met. *United States* v. *Palermo*, 21 F.R.D. 11, 13 (S.D.N.Y. 1957). In this regard the court in *United States* v. *Winkler*, 17 F.R.D. 213 (D.R.I. 1955), held:

> [T]he right of a defendant to the production and inspection of documents and objects prior to trial under Rule 17(c) is not absolute but that upon objection thereto good cause for such production and inspection must be first shown by the party seeking the same. (17 F.R.D. at 215).

In *Iozia*, where the defendant sought a subpoena, the court held that "there must be a showing of good cause to entitle the defendant to production and inspection of documents under Rule 17(c)." 13 F.R.D. at 338. "Good cause" as defined by the *Iozia* court, requires a showing by the defendant [73] that all four of

[72] This case has been prominently cited in numerous decision. See for example, *United States* v. *Bearden*, 423 F. 2d 805, 810 n. 4, (5th Cir.), *cert. denied*, 400 U.S. 836 (1970); *United States* v. *Garrison*, 168 F. Supp 622, 624 (E.D. Wis. 1958); *United States* v. *Duncan*, 22 F.R.D. 295, 298 (S.D.N.Y. 1958).

[73] That the provisions of Rule 17(c) are applicable to the government as well as to a defendant is not open to serious challenge. See *United States* v. *Gross*, 24 F.R.D. 138, 140 (S.D.N.Y. 1959).

the criteria set out above have been met. In the court below there was not even a showing that the material sought "would be admissible in evidence or relevant at trial." See *United States* v. *Winkler,* 17 F.R.D. 213, 215 (D.R.I. 1955).

That the Special Prosecutor has failed to demonstrate that the materials requested are "relevant and evidentiary" is readily apparent from the record of the court below. The original Rule 17(c) motion was supported by the Special Prosecutor's affidavit and memorandum of May 10, 1974. At page two of this affidavit, the Special Prosecutor requested 64 presidential conversations on the bald assertion that each of these materials *"contains or is likely to contain* evidence that will be relevant to the trial of this case." (emphasis added). At page two of his memorandum of May 10, 1974, the Special Prosecutor, in an unsupported allegation, stated: *"In all probability,* many of the subpoenaed items will contain evidence which will be relevant and material to the trial . . ." (emphasis added). Thus, it is evident that the Special Prosecutor was unable to make the necessary showing that each of the requested 64 items was evidentiary. A general allegation that some or a majority of the material sought may be relevant or admissible is not sufficient under *Iozia* to establish that all requested items "are evidentiary and relevant." 13 F.R.D. at 338.

Moreover, even the general assertion made by the Special Prosecutor that some of the materials may be relevant is devoid of any meritorious factual support. As such, it was an unsupported allegation seeking dis-

covery and Rule 17(c) may not be used for that purpose. It has been firmly established in criminal cases that in seeking discovery, the requirement of a showing of materiality and admissibility is not satisfied, "by a mere conclusory allegation that the requested information is material" to the preparation of a case. *United States* v. *Conder*, 423 F. 2d 904, 910 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970). Nor is it sufficient to make a "bare allegation that the requested information would be material in the preparation of the defense." 423 F. 2d at 910.

From the Special Prosecutor's statements that the requested materials were "likely to contain evidence" and "in all probability" may contain evidence, it is readily apparent that he was attempting to seek evidence not already known. As the court definitively stated in *United States* v. *Frank*, 23 F.R.D. 145 (D.D.C. 1959), Rule 17(c) "does not permit blunderbuss inspection of the government's evidence in an attempt to learn something not known, it is not a discovery provision." 23 F.R.D. at 147. This same concept was reaffirmed by the court in *United States* v. *Gross*, 24 F.R.D. 138 (S.D.N.Y. 1959), when it stated "*the government* [cannot] use Rule 17(c) to obtain leads as to the existence of additional documentary evidence or seek information relating to the defendant's case." 24 F.R.D. at 141 (emphasis added). Any request designed merely to disclose additional evidence not already known has properly been termed a "fishing expedition," which will not be countenanced under this rule. *Bowman Dairy Co.* v. *United States*, 341 U.S. at 221. The Special Prosecutor is obviously

attempting to use Rule 17(c), contrary to established case law, to obtain additional evidence not already known.

In addition, the district court is noticeably silent to the teaching of *United States* v. *Marchisio,* 344 F. 2d 653, 669 (2d Cir. 1965), that a subpoena *duces tecum* in a criminal action is not intended for the purposes of discovery, and that the documents sought must at that time meet the test of relevancy and admissibility.

It is also important to emphasize that there is an essential distinction between disclosure in civil and criminal actions. *United States* v. *Maryland & Virginia Milk Producers, Inc.,* 9 F.R.D. 509 (D.D.C. 1949). In this regard it is interesting to note that contrary to the more limited criminal discovery provisions applicable here, the Special Prosecutor's request in this instance was very similar in both substance and tone to the broader civil discovery provisions of Rule 26 of the Federal Rules of Civil Procedure.[74]

Additionally, it has been judicially recognized that the test to be met by one seeking material must be met

[74] Rule 26, F.R.C.P. provides, in part:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the information sought will be inadmissible at the trial if *the information sought appears reasonably calculated to lead to the discovery of evidence.* (emphasis added).

at the time that the items are sought, and the mere "probability" that the items may later become relevant is of no consequence. The court in *United States* v. *Marchisio,* 344 F. 2d 653 (2d Cir. 1965), stated: "Unlike the rule in civil actions, a subpoena *duces tecum* in a criminal action is not intended for the purpose of discovery; the documents sought must at that time meet the tests of relevancy and admissibility." 344 F. 2d at 669. See also *United States* v. *Murray,* 297 F. 2d 812, 821–822 (2d Cir. 1962); *United States* v. *Palermo,* 21 F.R.D. 11, 13 (S.D.N.Y. 1957).

Furthermore, in the Special Prosecutor's conclusion to the first section of his argument, he, in effect, urged the court below to allow him a lesser standard of relevancy and evidentiary showing when "seeking material from third parties the precise contents of which is unknown" (Special Prosecutor's memorandum, May 10, 1974, at 1, 10). This suggestion of a lesser standard than that required by Rule 17(c) case law is not as astonishing as the tacit implication that the Special Prosecutor does not know the contents of the material he is seeking. For without this knowledge, the Special Prosecutor cannot even hope to meet any of the *Iozia* criteria and is obviously on a "fishing expedition" or is attempting to use Rule 17 (c) as a discovery device.

It is also readily apparent that since the Special Prosecutor cannot show that the privileged conversations are relevant for the purpose for which he seeks them, he is attempting to formulate a new standard whereby the President should produce the recorded

conversations unless the President can establish to the satisfaction of the Special Prosecutor and this Court that the subpoenaed conversations are not relevant. This attempt to shift the burden of establishing relevancy from the party seeking material under Rule 17(c) to the party being subpoenaed is unsupported by any case law and flies in the face of established precedent. In this regard the court in *United States* v. *Winkler,* 17 F.R.D. 213 (D.R.I. 1955), held:

> The right of a defendant to the production and inspection of documents and objects prior to trial under Rule 17(c) is not absolute but that upon objection thereto good cause for such production and inspection must be first shown by the party seeking the same. (17 F.R.D. at 215).

As a further attempt to demonstrate admissibility, the Special Prosecutor proffers at pages 15–16 of his memorandum of May 10, 1974, that "statements made during conversations may be useful to the Government for the purpose of impreaching defendants Haldeman, Ehrlichman, and Colson should they elect to testify in their own behalf." The Special Prosecutor's suggestion that he is entitled to materials useful for impeachment conceals the fact that courts hold that impeachment materials cannot be obtained in advance of trial and one must wait to see if the person to be impeached actually testifies. *United States* v. *Carter,* 15 F.R.D. 367, 371 (D.D.C. 1954) (Holtzoff, J.); *United States* v. *Murray,* 297 F. 2d 812, 821–822 (2d Cir.) *cert denied,* 369 U.S. 828 (1962); *United States* v. *Brockington,* 21 F.R.D. 104, 106 (E.D. Va. 1957); *United States* v. *Hiss,* 9 F.R.D. 515, 516–517 (S.D.N.Y. 1949).

In light of the lower court's conclusion that the President was, in essence, a third party, it should be noted that in criminal proceedings, because of the respective roles of the parties, it is much easier for a defendant to factually satisfy the *Iozia* requirements when seeking items from the government than it is for the government or defendant to do so against a third party. This is because a defendant may make conclusive statement as to relevancy and admissibility without knowing the precise nature of the materials. Prosecutors by presenting evidence to a grand jury and intending to use evidence at trial, necessarily classify such items as relevant and evidentiary. Thus, it follows that a defendant may utilize conclusive assertions regarding the quality of material he seeks. Obviously, the government does not have this same advantage of utilizing unsupported statements and must therefore justify in greater specificity the items it is seeking.

B. THE PRESIDENT SHOULD NOT BE JUDGED AS A "TYPICAL" THIRD PARTY.

The Special Prosecutor has attempted to ease his "relevant and evidentiary" burden under Rule 17(c) by pointing out at page 7 of his memorandum of May 10, 1974, that "in the instant case the Government seeks to obtain evidentiary items from a third party." The President, however, is not a normal third party. But even it he were, it is well established that a typical third party has rights which protect him from burdensome subpoenas. *Application of Magnus,* 299 F. 2d 335, 337 (2d Cir.), *cert. denied,* 370 U.S. 918 (1962)

(third party corporation has standing to object to an IRS subpoena which would infringe constitutional rights); *Amsler* v. *United States*, 381 F. 2d 37, 51 (9th Cir. 1967) (Rule 17 subpoena to third party quashed when court held subpoena was oppressive and unreasonable). As Judge Moore stated in *In Re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12 (2d Cir.), *cert. denied*, 373 U.S. 902 (1962):

> Third parties have the protection always accorded to them by the courts which limit burdensome subpoenas, restrict them to relevant materials and refuse to permit unwarranted searches and seizures. (311 F. 2d at 16).

Thus, even judicial subpoenas directed to third parties have been restricted to *relevant* materials, not materials which have a "likelihood of relevancy" as the Special Prosecutor suggests. Even as a normal third party responding to a judical subpoena, the President should be afforded, at a minimum, the full range of rights afforded by the Fourth Amendment. As this Court observed in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), a subpoena is, in many ways, like a search warrant and as such it must meet the constitutional requirements of the Fourth Amendment. In the instant case, the Special Prosecutor's inadequate showing of relevancy can be likened to the lack of definiteness and overbreadth which are abuses guarded against by the Fourth Amendment. In this context, the Court in *Oklahoma Press* held, "[t]he gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." 327 U.S. at 208.

The district court's finding that the Special Prosecutor was merely seeking "evidentiary items from a third party" is clearly erroneous. The Constitution states, "The executive Power shall be vested in a President of the United States of America." U.S. Const., Article II, section 1. To allow this constitutionally mandated power to be challenged and overcome by a district court subpoena issued under the standards governing subpoenas to third parties, is an action that would erode and ultimately destroy the "separation of powers" concept that has existed since 1787.

CONCLUSION

Last fall, the United States Court of Appeals for the District of Columbia circuit observed in *Nixon* v. *Sirica,* 487 F. 2d 700 (D.C. Cir. 1973):

> We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch. (487 F. 2d at 715).

The velocity with which the confidentiality of presidential communications has eroded in the short time since the quoted words were written is demonstrated by the vast scope of the Special Prosecutor's pending subpoena, by the meager grounds offered to support it, and by the district court's casual disposition of the President's motion to quash. This circumstance—and the escalating confusion and torrent of prejudicial leaks generated by the concurrent involvement of the President in criminal proceedings as a so-called "third party" and in an impeachment investigation as the putative respondent—recalls the introductory words

of the brief filed on behalf of the President in *Nixon* v. *Sirica*. Those words are relevant here because they analyze the dynamics of this case and the course it will take in terms that continue to be valid for this and other Presidents in their effort to maintain the confidentiality upon which the effective functioning of the Presidency so crucially depends.

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Holmes, J., dissenting in *Northern Securities Co.* v. *United States,* 193 U.S. 197, 400–401 (1904). This case is a classic illustration of the danger against which Justice Holmes warned.

The District Court, in a decision utterly without precedent, has held that it is for it, and not for the President, to decide whether the public interest requires that private Presidential conversations be kept confidential, and it has held that it may, by compulsory process, order the President to produce recordings of these conversations if the Court determines to do so.

As recently as a year ago such a ruling would have been unthinkable. The universal view of the legal community, as reflected in the literature, was that the

courts lacks power to substitute their judgment for that of the President on an issue of this kind and that they lack power to compel a President to make production. It was, quite literally, hornbook law that "confidential communications to and from the President are inviolate to a judicial request * * *." Forkosch, *Constitutional Law* 131 (1963).

The change in the climate of legal and popular opinion that has made a ruling such as that of the District Court possible is the result of Watergate. The hydraulic force arising out of that sordid and unhappy episode has led men of great distinction to suppose that the Constitution means something different today than it meant throughout all of our history and to contend that the need to exhaust every avenue of factual inquiry concerning Watergate ranks so high in our national priorities that it must be served, even if the cost is to impair markedly the ability of every President of the United States from this time forward to perform the Constitutional duties vested in him.

It is no exaggeration to say that the revelations of Watergate have so sharpened the public appetite for more revelations that the claim of a Presidential right and responsibility under the Constitution to maintain the confidentiality of Presidential conversations must run the gamut of a broadly held popular sentiment that the claim is probably unjust and is therefore presumably unsound. The President's assertion of a right to maintain this confidentiality, a right relied on by every President since George Washington, is

likened to the absolute claim of kings. His stand on an important Constitutional principle is viewed in many places with suspicion or even hostility. Despite his unprecedented cooperation with the investigations by allowing his advisers to testify about relevant portions of the conversations in question, he stands accused in some quarters of obstructing rather than facilitating the investigations.

Our submission on this appeal must acknowledge this Watergate phenomenon since it is an operative factor, though it is one that courts, judging in calmness and not moved by the passions of the moment, should be expected to ignore. We conceive it to be our task to demonstrate that the decision below was reached by casting the Constitution in the mold of Watergate rather than by applying Constitutional practices and restraints to the facts of Watergate. It is our further responsibility to show that what may seem inevitably just in the heat and excitement of an unprecedented political scandal may prove inexorably corrosive to the principles and practices of a Constitution that must stand the test of a long and uncertain future and serve the needs of a changing culture and polity.

With all respect, the decision below did not harmlessly walk the "middle ground" between an overbroad claim of privilege and an excessive demand for discovery. We do not doubt at all but that this was the well-intentioned aim of the distinguished judge of the court below. But in result, the ruling below, in decisive terms, came down squarely on the side of breaching the wall of confidentiality of Presidential communi-

cations. If sustained, that decision will alter the nature of the American Presidency profoundly and irreparably. If sustained, it will alter, equally irreparably, the delicate balance that has existed between three heretofore separate and co-equal branches of government.

* * * * *

For the foregoing reasons, the decision of the district court denying the President's motions to quash and expunge should be reversed.

Respectively submitted.

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(APPENDIX)

APPLICABLE 'PROVISIONS OF CONSTITUTION, STATUTES, RULES, AND REGULATIONS

1. The Constitution of the United States provides in pertinent part—

Article I, Section 2:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, * * but each State shall have at Least one Representative; and until such enumeration shall

be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

* * * * *

The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,] * * * for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equaly as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.]*

No Person shall be a Senator who shall not have attained to the Age of thirty years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

* * * * *

Article I, Section 5:

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any questions shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other,

adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

* * * * *

Article I, Section 6:

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

* * * * *

Article II, Section 1:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible

to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

[In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law, provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

* * * * *

Article II, Section 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons

for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

* * * * *

Article II, Section 3:

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * * *

Article III, section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under

their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * * * *

2. Title 18, United States Code, provides in pertinent part:

§ 371. Conspiracy to commit offense or to defraud United States—

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

* * * * *

§ 1001. Statements or entries generally—

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

* * * * *

§ 1503. Influence or injuring officer, juror or witness generally—

Whoever corruptly or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other com-

mitting magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter of communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As amended Oct. 17, 1968, Pub. L. 90–578, Title III, § 301(a) (1), (3), 82 Stat. 1115.

§ 1621. Perjury generally—

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub. L. 88–619, § 1, 78 Stat. 995.

* * * * *

§ 1623. False declarations before grand jury or court—

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the

defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub. L. 91–452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932.

§ 35.00. Demands for production of statements and reports of witnesses—

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

[*See main volume for text of* (*b*) *and* (*c*)]

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

As amended Pub. L. 91–452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926.

* * * * *

§ 3731. Appeal by United States—

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes. As amended Jan. 2, 1971, Pub. L. 91–644, Title III, § 14(a), 84 Stat. 1890.

Title 28, United States Code, provides in pertinent part:

§ 44. Appointment, tenure, residence and salary of circuit judges—

(a) The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits as follows:

Circuits	*Number of Judges*
District of Columbia	Nine
First	Three
Second	Nine
Third	Nine
Fourth	Seven
Fifth	Fifteen
Sixth	Nine
Seventh	Eight
Eighth	Eight
Ninth	Thirteen
Tenth	Seven

(b) Circuit judges shall hold office during good behavior.

(c) Except in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service.

(d) Each circuit judge shall receive a salary of $33,000 a year. As amended Aug. 3, 1949, c. 387, § 1, 63 Stat. 493; Feb. 10, 1954,

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c. 6, § 1, 68 Stat. 8; Mar. 2, 1955, c. 9, § 1 (b), 69 Stat. 10; May 19, 1961, Pub. L. 87–36, § 1(b), 75 Stat. 80; Aug. 14, 1964, Pub. L. 88–426, Title IV, § 403(b), 78 Stat. 434; Mar. 18, 1966, Pub. L. 89–372, § 1(b), 80 Stat. 75; June 18, 1968, Pub. L. 90–347, § 3, 82 Stat. 183.

* * * * *

§ 133. Appointment and number of district judges—

The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows:

As amended June 2, 1970, Pub. L. 91–272, § 1(c), (d), 84 Stat. 294, 295; Dec. 18, 1971, Pub. L. 92–208, § 3(d) 85 Stat. 742.

§ 1254. Courts of appeals; certiorari; appeal; certified questions—

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire

matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

* * * * *

§ 1291. Final decisions of district courts—

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85–508, § 12(e), 72 Stat. 348.

* * * * *

§ 1651. Writs—

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

Title 44, United States Code, provides in pertinent part:

§ 2107. Material accepted for deposit—

When the Administrator of General Services considers it to be in the public interest he may accept for deposit—

(1) the papers and other historical materials of a President or former President of the United States, or other official or former official of the Government, and other papers relating to and contemporary with a President or former President of the United States, subject to restrictions agree-

able to the Administrator as to their use; and

(2) documents, including motion-picture films, still pictures, and sound recordings, from private sources that are appropriate for preservation by the Government as evidence of its organization, functions, policies, decisions, procedures, and transactions. Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1288.

* * * * *

§ 2108. Presidential archival depository—

(c) When the Administrator considers it to be in the public interest, he may exercise, with respect to papers, documents, or other historical materials deposited under this section, or otherwise, in a Presidential archival depository, all the functions and responsibilities otherwise vested in him pertaining to Federal records or other documentary materials in his cutody or under his control. The Administrator, in negotiating for the deposit of Presidential historical materials, shall take steps to secure to the Government, as far as possible, the right to have continuous and permanent possession of the materials. Papers, documents, or other historical materials accepted and deposited under section 3106 of this title and this section are subject to restrictions as to their availability and use stated in writing by the donors or depositors, including the restriction that they shall be kept in a Presidential archival depository. The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf. Subject to the restrictions, the Administrator may dispose by sale, exchange, or otherwise, of papers, documents, or other materials which the Archivist determines to

have no permanent value or historical interest or to be surplus to the needs of a Presidential archival depository. Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1289.

3. Rule 26, Federal Rules of Civil Procedure, provides in pertinent part:

> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> * * * * *
>
> (3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case

and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

* * * * *

Rule 6, Federal Rules of Criminal Procedure, provides in pertinent part:

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

* * * * *

Rule 17, Federal Rules of Criminal Procedure, provides in pertinent part:

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the

subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

4. Department of Justice Order No. 551–73 (Nov. 2, 1973) 38 Fed. Reg. 30,738 adding 28 C.F.R. §§ 0.37, and 0.38, and Appendix to Subpart G–1, provides:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Order No. 551–73

Establishing the Office of Watergate Special Prosecution Force

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part O of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1(a) which lists the organization units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of Criminal Justice."

2. A new Subpart G–1 is added immediately after Subpart G, to read as follows:

"Subpart G–1—Office of Watergate Special Prosecution Force

§ 0.37 General Functions

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecution Force shall be under the direction of The duties and responsibilities of the Special Prosecutor are set forth in the attached appendix which is incorporated and made a part hereof.

§ 0.38 Specific Functions.

The Special Prosecutor is assigned and delegated the following specific functions with respect to matters specified in this Subpart:

(a) Pursuant to 28 U.S.C. 515(a), to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct, and to designate attorneys to conduct such legal proceedings.

(b) To approve or disapprove the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order, or other demand of a court or other authority. (See Part 16(B) of this chapter.)

(c) To apply for and to exercise the authority vested in the Attorney General under 18 U.S.C. 6005 relating to immunity of witnesses in Congressional proceedings.

The listing of these specific functions is for the purpose of illustrating the authority entrusted to the Special Prosecutor and is not intended to limit in any manner his authority to carry out his functions and responsibilities."

Robert H. Bork,
Acting Attorney General.

Date: November 2, 1973.

APPENDIX

Duties and Responsibilities of the Special Prosecutor

The Special Prosecutor

There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

—conducting proceedings before grand juries and any other investigations he deems necessary;

—reviewing all documentary evidence available from any source, as to which he shall have full access;

—determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;

—determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders;

—deciding whether or not to prosecute any individual, firm, corporation or group of individuals;

—initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals;

—coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;

—dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his

duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.

Staff and Resource Support

1. *Selection of Staff.*—The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budgets.*—The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and Responsibility.*—The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division.—Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies.—Except as otherwise herein specified or as mutually agreed between the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be the subject to the administrative regulations and policies of the Department of Justice.

Public Reports.—The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment.—The Special Prosecutor will carry out these responsibilities with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

5. Department of Justice Order No. 554–73 (Nov. 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G–1, provides—

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part 0—Organization of the Department of Justice

Subpart G–1—Office of Watergate Special Prosecution Force

Order No. 554–73

AMENDING THE REGULATIONS ESTABLISHING THE OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, the last sentence of the fourth paragraph of the Appendix to Subpart G–1 is amended to read as follows: "In accordance with assurances given

by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, (1) the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action, and (2) the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action."

ROBERT H. BORK,
Acting Attorney General.

Date: November 19, 1973.

6. The letter from the Acting Attorney General to the Special Prosecutor on November 21, 1973, stating the intention of Department of Justice Order No. 554–73, is as follows—

OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C. 20530,
November 21, 1973.

LEON JAWORSKI, Esq.,
Special Prosecutor,
Watergate Special Prosecution Force,
1425 K Street, N.W.,
Washington, D.C. 20005

DEAR MR. JAWORSKI: You have informed me that the amendment to your charter of November 19, 1973 has been questioned by some members of the press. This letter is to confirm what I told you in our telephone conversation. The amendment of November 19, 1973 was intended to be, and is, a safeguard of your independence.

The President has given his assurance that he would not exercise his constitutional powers either to discharge the Special Prosecutor or to limit the independence of the Special Prosecutor without first consulting the Majority and Minority leaders and chairmen and ranking members of the Judiciary Committees of the Senate and the House, and ascertaining that their consensus is in accord with his proposed action.

When that assurance was worked into the charter, the draftsman inadvertently used a form of words that might have been construed as applying the President's assurance only to the subject of discharge. This was subsequently pointed out to me by an assistant and I had the amendment of November 19 drafted in order to put beyond question that the assurance given applied to your independence under the charter and not merely to the subject of discharge.

There is, in my judgment, no possibility whatever that the topics of discharge or limitation of independence will ever be of more than hypothetical interest. I write this letter only to repeat what you already know: the recent amendment to your charter was to correct an ambiguous phrasing and thus to make clear that the assurances concerning congressional consultation and consensus apply to all aspects of your independence.

Sincerely,

ROBERT H. BORK,
Acting Attorney General.

U.S. GOVERNMENT PRINTING OFFICE: 1974